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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 415

CAROLYN BRADLEY, *et al.*,

Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, N. Y. 10019

S. W. TUCKER
HENRY L. MARSH, III
214 East Clay Street
Richmond, Virginia

Attorneys for Petitioners

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on April 7, 1965.

Citations to Opinions Below

The memorandum opinion of the District Court of July 25, 1962 (R. I-61)[1] is unreported and is printed in the appendix hereto, *infra* p. 1a. The opinion of the Court of Appeals issued May 10, 1963 (R. I-76), printed in the ap-

[1] The record contains Volumes I to VI. Each volume begins with a page numbered 1. Thus record citations herein are to the volume and page number as above indicating Volume I, page 61.

pendix hereto, *infra* p. 9a, is reported at 317 F. 2d 429. The District Court's opinion of March 16, 1964 (R. I-128), appears in the appendix below at page 29a. The second opinion of the Court of Appeals dated April 7, 1965 (R. V-5), printed in the appendix p. 40a, *infra,* is reported at 345 F. 2d 310.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1965 (R. V-36); appendix p. 71a, *infra.* Mr. Justice Goldberg on June 28, 1965, extended the time for filing the petition for certiorari until August 1, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Richmond, Virginia school board's "freedom of choice" policy is adequate under *Brown* v. *Board of Education* to disestablish the system of racial segregation created by past compulsory pupil assignment policies in the context of a continuing practice of assigning all school teachers on the basis of race in a segregated pattern.

2. Whether Negro pupils are entitled to demand a prompt end to the school authorities' practice of racially segregating teachers by assigning them on the basis of race as a violation of the pupils' right to attend a nondiscriminatory public school system.

Statutes and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

This cause was filed in the United States District Court for the Eastern District of Virginia September 5, 1961, by petitioners, a group of Negro parents and children in Richmond, Virginia, who sought injunctive relief against public school segregation pursuant to 28 U. S. C. §1343 and 42 U. S. C. §§1981 and 1983.[2] Petitioners sought an injunction against the Richmond school board and superintendent and against the Virginia Pupil Placement Board, a state agency with statutory responsibilities concerning the assignment of pupils. Petitioners here seek a review of the adequacy of the school board's desegregation plan which was approved by the courts below.

The complaint, brought as a class action under Rule 23(a), F. R. Civ. Proc., alleged, *inter alia,* that the school authorities had not devoted efforts toward initiating non-segregation and bringing about the elimination of racial discrimination in the public school system and that they had not "made a reasonable start to effectuate a transition to a racially non-discriminatory system . . ." (R. I-11).

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[2] The complaint also alleged "Federal Question" jurisdiction under 28 U. S. C. §1331.

The complaint as amended[3] requested an order requiring admission of the 11 minor petitioners in specified all-white schools and also general injunctive relief against the segregated system and discriminatory practices. It included a request that the defendants be required to submit to the court a desegregation plan as well as periodic reports of their progress in effectuating a transition to a racially nondiscriminatory school system (R. I-36-37). Petitioners also sought attorneys' fees. The defendants generally denied that petitioners were entitled to relief; the Richmond officials contended that sole responsibility for placing pupils was in the hands of the defendant Pupil Placement Board (R. I-53, 55).

July 23, 1962, the case was tried before Hon. John D. Butzner, Jr.,[4] and on July 25, 1962, Judge Butzner filed an opinion (R. I-61) and entered an injunction (R. I-71) against the defendants requiring the admission of ten petitioners to white schools,[5] but refusing any general injunction against discrimination.

Although all of the petitioners were thereby admitted to white schools, they appealed the refusal to enter general injunctive relief and to require a desegregation plan. The Fourth Circuit (Judge Bryan dissenting) reversed and remanded, directing entry of an injunction against the discriminatory practices and indicating that the school board

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[3] Following motions to dismiss the original complaint (R. I-15, 20) the complaint was amended January 4, 1962 (R. I-26). The amended complaint alleged facts concerning the applications of the individual plaintiffs' admission to specified schools.

[4] The transcript of the trial of July 23, 1962, is Vol. II of the record.

[5] The remaining infant petitioner had been admitted by the school authorities prior to the hearing.

should be encouraged to submit a more definite plan for termination of the discriminatory system (317 F. 2d 429, May 10, 1963). The majority opinion contains a detailed factual statement describing the segregated operation of the Richmond schools, and the limited first steps which had departed from total segregation. It referred to earlier school segregation litigation in Richmond from 1958 to 1961 culminating in the admission of 1 Negro to a white school by an order of District Judge Lewis, refusing any class relief and dismissing the prior case from the docket.[6] The Court of Appeals concluded that it found "nothing to indicate a desire or intention to use the enrollment or assignment systems as a vehicle to desegregate the schools" and that the refusal to enter an injunction left the defendants "free to ignore the rights of other applicants" for nonracial assignments.

When the present case commenced in September 1961 Richmond had 41,568 children (17,777 white and 23,791 Negro)[7] attending 61 schools.[8] Only 37 Negro children were

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[6] The Court of Appeals' description of the prior case is in 317 F. 2d at 432, n. 3, 435. The prior suit, *Warden* v. *School Board of City of Richmond* (E. D. Va., July 5, 1961), unofficially reported 6 Race Rel. L. Rep. 1025, was filed September 2, 1958, by Negro pupils who had been denied admission in two white schools. As the Fourth Circuit observed, the school board converted the white school which most of the plaintiffs sought to enter to a Negro school by transferring out its white students and faculty and moving in Negro students and faculty. A single remaining plaintiff who sought transfer from a Negro school *five miles* from her home to a white school in her neighborhood finally obtained admission by the court order entered July 5, 1961, three years after her original application. (School Board Minutes pertaining to the 1958 events described are Pl's Exhibits 16 and 17 in the present record.)

[7] Pl's Exhibit 8, Depositions of Willet, *et al.* p. 8 (hereinafter cited as Deposition).

[8] (R. I-43-44.)

assigned with whites at three schools (R. I-45-46). The first desegregation had begun in the 1960-61 term with 2 Negroes in white schools. Judge Butzner's opinion described the manner in which pupils were initially placed in schools and promoted from one to another on the basis of race through use of dual overlapping attendance areas for Negroes and whites. It also described the discriminatory application of transfer criteria to those Negro pupils who actively sought admission to white schools (R. I-62-64, 66-68). Although the local school board professed not to have assignment power, it continued to maintain dual attendance areas adopted before the *Brown* decision which governed an estimated 98% of the children who were placed routinely by the Pupil Placement Board in accord with the locally established pattern. The routine placement of Negroes in all-Negro schools was sought to be justified at the trial by the authorities on the theory that Negroes preferred segregation. Chairman Oglesby of the Placement Board testified (R. II-54-55):

> Normally, I would say fully 99 per cent of the Negro parents who are entering a child in First Grade prefer to have that child in the Negro school.
>
> * * * * *
>
> And it is true that in general there will be two schools that that child could attend in his area, one white and one Negro, and we assume that the Negro wants to go to the Negro school unless he says otherwise, but if he says otherwise, he gets the other school.

Pupils who sought transfers out of the zones were judged by the Pupil Placement Board's transfer standards. This

involved, the court found, the rejection of Negro transfer applications on academic and residence standards not applied to white pupils routinely enrolled in the same schools (R. I-65-68).

Richmond pupils had been assigned to schools on the basis of separate overlapping attendance areas for Negroes and whites for many years.[9] Maps indicating the location of schools and the areas for the high schools (Pl's Ex. 5), junior high schools (Pl's Ex. 6) and elementary schools (Pl's Ex. 7) were introduced in evidence. Plaintiffs also introduced school census data showing that Negroes and whites lived in the same neighborhoods in many sections of the City.[10]

The faculties in the white pupil schools were all white, and the schools with Negro students had all Negro teachers (Deposition 13). The school board's Rules and Regulations describe the personnel policies and procedures (Pl's Ex. 1 at p. 28):

* * * * *

2. Assignment of Employees.

Each employee of the school board shall be assigned to a specific position by and under the direction of the superintendent of schools and may be transferred to any other position for which qualified.

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[9] Testimony at pp. 27-28 illustrates the operation of the overlapping zones, where white pupils and Negroes in the same areas attend different schools.

[10] See generally R. II-12-24 explaining Pl's Exhibits 12-15. Exhibit 14, a plastic overlay, indicates the number of white and Negro pupils by age group in each section of the City, and can be compared with the school attendance areas when placed over Exhibits 5, 6 or 7.

3. Transfer of employees.

Transfer may be made by the superintendent on his own authority or at the request of the employee for any purpose which in the judgment of the superintendent is for the welfare of the employee or the schools.

A statement of "Richmond Public Schools Administrative Policies" (attached to Pl's Ex. 1) indicates that the responsibility for personnel selection is shared by the administration, Personnel Department and the school principal or department head concerned. Teachers in Richmond are given ten month contracts, serve a two year probation when first employed, and thereafter usually have continuing contracts which are renewed unless they are notified to the contrary by April 15th of each year. (See Pl's Ex. 1, Rules and Regulations, Ch. VI, pp. 24-31.)

The evidence showed a pattern of severe overcrowding in Negro schools and under-utilization of white schools. As the Court of Appeals observed (317 F. 2d at 435), the authorities had not dealt with overcrowding by assigning Negro pupils to schools with white children which had available space in the same areas (R. II-32). Instead, they built new schools for Negroes and converted white schools to all-Negro schools (*ibid.*). At the time of the trial 90 Negro children had been granted transfers to white schools for the 1962-63 term in addition to the 37 enrolled during the 1961-62 year (R. II-77-78).

After the Fourth Circuit remanded the case the district court entered an order June 6, 1963, enjoining the defendants from refusing the admission of any pupil to any

public school on the basis of race, from assigning pupils on the basis of dual overlapping zones, from assigning pupils on the basis of race upon promotion from one school to another, and from conditioning the grant of transfers on the applicants' submission to futile, burdensome or discriminatory procedures (R. I-97-98). The court also invited the defendants to submit a desegregation plan, and stipulated that the injunction would be superseded by an approved plan (R. I-98).

On July 11, 1963, plaintiffs moved for further injunctive relief challenging the school board's action in assigning pupils for the forthcoming term in accord with a resolution the board had adopted March 18, 1963 (R. I-100). At the hearing on this motion on July 29, 1963 (R. Volume III), the school board filed its March 18, 1963 resolution and requested that the court approve it as a plan of desegregation (Defendants' Ex. 1 and 1a). The full text of the resolution is set out in the margin.[11]

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[11] "Whereas, the Richmond School Board has been advised by special counsel and the City Attorney that in order to comply with the decision of the Federal District Court in the case of Bradley v. The School Board of the City of Richmond and the State Pupil Placement Board, the school attendance areas previously established for white and Negro schools may no longer be used in the assignment of pupils.

"Now, Therefore, be it Resolved as follows:

"(a) Recommendations for assignment of pupils seeking enrollment in the public school system for the first time or initial enrollment in the junior or senior high schools shall be made upon consideration of the distance the pupils live from such schools; the capacity of such school; availability of space in other schools; whether the program of the pupil can be met by such school; the school preference as shown on the pupil placement application form; and what is deemed to be in the best interest of such pupil.

"(b) The school administration shall recommend that pupils be assigned to the schools which they attended the preceding

At the hearing the superintendent testified that for the then forthcoming 1963-64 term dual attendance zones had been abolished and no new zones were adopted (R. III-6, 8); that all pupils entering school were required to apply for a specific school (R. III-8); that every child finishing the top grade in elementary school or junior high school was required to choose a school (*ibid.*); that no Negro applicant to a white school was denied admission (*ibid.*); that the only criteria applied thus far were school capacity (but this had not resulted in denial of any Negro application to a white school) (R. III-10) and a May 31st deadline for transfers (R. III-12); that pupils enrolled in a school continued in that school unless they requested to move out or reached the top grade (R. III-17-18); that a total of 239 Negroes applied before the deadline and were admitted at white schools (148 finishing highest grade in school, 81 in grades below top grade, 10 beginning school) (R. III-22).[12]

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year, except those eligible for promotion to another school. However, application may be made by the parent, guardian or other person having custody of such pupils for their placement in another school named in the application in which case the reason for the requested transfer should be stated. The school administration may recommend to the Pupil Placement Board that such application be approved if it be deemed to be in the best interest of the pupil.

"(c) Applications for transfers to a particular school must be made and received by the school administration before June 1 preceding the school year to which the placement requested is to be applicable." (Defendant's Exhibits 1 and 1a.)

[12] No current figures on Richmond desegregation are in the record. A published report indicates that in November 1964 there were 846 Negro children attending 13 schools with white children. This represented about 3% of the Negroes in the system. Southern Education Reporting Service, "Statistical Summary of School Segregation—Desegregation in the Southern and Border States", 14th Rev., Nov. 1964, p. 59.

After hearing this testimony the Court set dates for the petitioners to file exceptions to the plan as it had been explained and indicated it would schedule a further hearing on the proposed plan.

On August 22, 1963, plaintiffs filed exceptions to the plan attacking it as vague and indefinite and conferring absolute discretion on the school authorities to determine assignments, and asserting that as the plan had no specific school zones the plan "affords the Court no basis upon which to appraise the practical impact of an order approving the plan or any part of it" (R. I-110-111). The petitioners objected to the provision granting transfers if "deemed to be in the best interest of the pupil" and also objected that the plan "omits any provision for the assignment or reassignment of teachers and staff of the schools on a nonracial basis" saying they were asserting "their personal rights to attend a school system in which there is no racial segregation or discrimination" (R. I-112).

September 9, 1963, plaintiffs filed a motion for a temporary restraining order to require the admission at a white high school of two Negro pupils who had been denied transfers on the ground that their applications were not received before the deadline. The Court granted the restraining order on the basis of the prior injunction (R. I-123), and it was subsequently made permanent (R. I-143-144).

On December 20, 1963, there was a further hearing on the plan and on petitioners' motion for attorneys' fees (R. Volume IV). By agreement prior evidence was considered part of the evidence on the plan. The application forms were placed in evidence;[13] the superintendent indicated that

[13] Curiously, the statewide Pupil Placement form (Def's Ex. 3) has no space designated for pupils to indicate the school they desire

pupils other than those completing the last grade in a school were asked to state the reason they sought a transfer. The superintendent stated that in 1963 there was one instance in which about 40 or 50 white children applied to a school that was overcrowded and "the parents were consulted" but no one was "sent to a school against his will" (R. IV-10). Counsel for the Pupil Placement Board advised the Court that that board approved the plan (R. IV-19).

The superintendent testified at the July hearing that the school board's purpose was to follow a "freedom of choice" plan similar to the one in Baltimore, and that the board had been guided in this by a suggestion made by the Fourth Circuit in the Charlottesville[14] case (R. III-7).

On March 16, 1964, Judge Butzner approved the plan and dissolved the injunction entered June 6, 1963 (R. I-128). The Court said that while the plan was framed in broad language, it was valid as it was being administered and interpreted; that the "best interest" criterion could not be used to deny transfers or admission unless made more definite; and that the school capacity criterion presented no problem at present but that if the situation changed residential requirements must avoid discrimination. The Court said that the absence of provision for faculty desegregation did not require rejection of a plan for the assignment of pupils.

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to attend. But the superintendent testified that all parents were required to indicate the school they chose when the child entered school or finished the highest grade in a school.

[14] *Dillard* v. *School Board of the City of Charlottesville,* 308 F. 2d 920, 923-924 (4th Cir. 1962), *cert. denied* 374 U. S. 827.

On petitioners' appeal the Fourth Circuit, *en banc*, affirmed, with Judges Sobeloff and Bell dissenting in part (345 F. 2d 310; appendix 40a). The Court held that the plan allowing "free transfers is an acceptable device for achieving a legal desegregation of schools," noting that the Court required "the elimination of discrimination from initial assignments as a condition of approval of a free transfer plan" and that "discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic system" (345 F. 2d at 318-319). The court said that the board might have established a single zone system for initial placements but that "would have been a major task" and that eliminating zoning was the equivalent of rezoning and "easier of accomplishment" when the board intended to allow pupils to choose schools in any event (*ibid.*).

The Court held that the District Court did not abuse its discretion in declining to order staff desegregation, stating that there was no inquiry "as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils" or as to the impact of an order upon the administration of the schools, and thus petitioners had not "discharged the burden they must shoulder of showing that such assignments effect a denial of their constitutional rights" (345 F. 2d at 320). The Court said, in part:

> Whether and when such an inquiry is to be had are matters with respect to which the District Court also has a large measure of discretion. The Fifth and Sixth Circuits have so held, and we agree. When direct measures are employed to eliminate all direct discrimi-

> nation in the assignment of pupils, a District Court may defer inquiry as to the appropriateness of supplemental measures until the effect and the sufficiency of the direct ones may be determined. The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools (*ibid.*) (footnotes omitted).

The Court affirmed the disallowance of counsel fees as within the trial judge's discretion saying that an award was required "only in the extraordinary case" (*id.* at 321).

Judges Sobeloff and Bell concurred in approval of the freedom of choice plan but made their "concurrence tentative on the assumption that the Resolution is an interim measure only and will be subject to a full review and reappraisal at the end of the present school year, or certainly not later than this fall after the opening of the 1965-66 school term, when the results of two years of the Resolution's operation will be known" (345 F. 2d at 321). They said that they were "not fully persuaded that the plan will be enough to enable the Negro pupils to extricate themselves from the segregation which has long been firmly established and resolutely maintained in Richmond" (*id.* at 322), and that much depended upon the board's attitude, which in the past had been that it had no duty "to integrate a particular school or desegregate it" or "to promote integration." They asserted that "good faith compliance requires administrators of schools to proceed actively with

their nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated" (*id.* at 323).

Judges Sobeloff and Bell dissented from the rulings concerning staff desegregation, the dissolution of the 1963 injunction, and counsel fees. On the teacher issue they wrote (*id.* at 324):

> The composition of the faculty as well as the composition of its student body determines the character of a school. Indeed, as long as there is a strict separation of the races in faculties, schools will remain "white" and "Negro," making student desegregation more difficult. The standing of the plaintiffs to raise the issue of faculty desegregation is conceded. The question of faculty desegregation was squarely raised in the District Court and should be heard. It should not remain in limbo indefinitely. After a hearing there is a limited discretion as to when and how to enforce the plaintiffs' rights in respect to this, as there is in respect to other issues, since administrative considerations are involved; but the matter should be inquired into promptly. There is no legal reason why desegregation of faculties and student bodies may not proceed simultaneously.

Reasons for Granting the Writ

This case involves two of the issues of greatest current concern in school segregation litigation throughout the South, the question of the adequacy of so-called freedom of choice desegregation plans to disestablish patterns of racial segregation created by governmental compulsion in the context of continuing faculty segregation, and the right of Negro pupils to demand a prompt end of the practice of assigning teachers on the basis of the race of the pupils in schools. Adoption of the Richmond plan and approval of it by the Fourth Circuit has been emulated widely by school districts and courts. At least four cases involving comparable issues already have been decided by the Fourth Circuit, and the views expressed in the Richmond case have been reaffirmed.[15] Indeed, the major new phenomenon in school desegregation litigation is the sudden abandonment of age-old normal school zoning practices and adoption of so-called free choice plans.

The issue of faculty desegregation is of transcendent importance in thousands of school districts where teachers are still assigned on the basis of race in a segregated pattern. The United States Commissioner of Education, as authorized by Title VI of the Civil Rights Act of 1964,[16]

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[15] See, e.g., *Bowditch* v. *Buncombe County Board of Education*, 345 F. 2d 429 (4th Cir. 1965); *Nesbit* v. *Statesville City Board of Education*, 345 F. 2d 333 (4th Cir. 1965); *Brown* v. *County School Board of Frederick County*, —— F. 2d —— (4th Cir. No. 9825, May 24, 1965); *Wheeler* v. *The Durham City Board of Education*, —— F. 2d —— (4th Cir. No. 9630, June 1, 1965).

[16] Title VI conditions federal financial assistance on nondiscrimination. Act of July 2, 1964, P. L. 88-352, Title VI, 72 Stat. 252, 42 U. S. C. A. §2000d, *et seq.*

has adopted a rule requiring that all desegregation plans submitted by districts receiving federal financial assistance "shall provide for the desegregation of faculty and staff" by making "initial assignments" nonracially and by steps toward the elimination of teacher and staff segregation resulting from prior assignments based on race.[17] It is important that this Court announce a similar unequivocal position against faculty segregation practices to establish a uniform rule for those districts in litigation (and submitting court approved plans as the basis for federal aid) and those submitting plans to the Commissioner of Education. The Congressional proponents of the Civil Rights Act of 1964 proceeded on the express assumption that the Commissioner could require faculty desegregation. Introducing Title VI, Vice President (then Senator) Humphrey made express reference to a Fifth Circuit opinion requiring faculty desegregation which this Court had declined to review, saying:

> In such cases the Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers at least where such discrimination affected the educational opportunities of students. See *Board of Education* v. *Braxton* [326 F. 2d 616 (5th Cir. 1964)].
>
> This does not mean that Title VI would authorize a federal official to prescribe pupil assignments, or to

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[17] General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, HEW, Office of Education, April 1964, Part V. B(1) (cited hereinafter as General Policy Statement). This Statement is reprinted in the appendix to *Price* v. *The Denison Independent School District*, —— F. 2d —— (5th Cir. No. 21632, July 2, 1965), and also in *Southern School News*, May 1958, p. 8.

> select a faculty, as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers and authority to achieve compliance with that requirement by cutting off funds or by other means authorized by law. (110 Cong. Rec. 6325 (daily ed. March 30, 1964))

However, the prospect of federal administrative pressure for faculty desegregation does not eliminate the urgent need for a similar expression from this Court. First, with respect to particular districts in litigation, the Commissioner of Education has indicated that a "final order of a court of the United States" will be accepted in lieu of a plan submitted to the agency (General Policy Statement, parts II.B and IV). Court orders finally approving plans which fail to contain basic provisions like faculty desegregation will work to create conflict. As Judge Wisdom of the Fifth Circuit recently wrote:

> The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy we have the same objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. . . . If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H. E. W. guides, school

boards may turn to the federal courts as a means of circumventing the H. E. W. requirements for financial aid. (*Singleton* v. *Jackson Municipal Separate School District*, —— F. 2d ——, 5th Cir. No. 22,527, June 22, 1965.)

Second, with respect to general standards the Commissioner obviously will be guided to some substantial degree by the legal principles emanating from the courts. Judicial declarations casting doubt on the necessity for faculty desegregation might immeasurably impair and stir resistance to the effective administration of the Commissioner's existing policy implementing the Act of Congress.

I.

The Richmond Pupil Assignment Plan, Viewed in the Context of Continuing Faculty Segregation and Other Factors, Is Fundamentally Inadequate to Disestablish the Segregated System of Schools.

Richmond's plan for assigning pupils, or rather, not assigning them, to schools is basically inadequate to effectuate the constitutionally required transition of a racially segregated school system to one operated without discrimination. There is no question here of the right of a school board in the abstract to allow pupils to choose their schools. The question is whether adoption of a policy providing for pupils to choose their schools is adequate to undo the effects of past wrongs, and discharge the duty to eliminate a segregated system. Petitioners submit that a school board does not adequately discharge its affirmative duty to initiate desegregation when, after years of actively placing pupils in schools on a segregated basis,

it adopts a "hands-off" attitude about pupil placements while maintaining faculty segregation in the schools.

Richmond traditionally has placed pupils in schools by the use of geographic attendance areas, allowing pupils choice in some situations between two schools in the same vicinity. Separate schools and attendance areas were maintained for Negroes. The totally segregated situation existing before, and for a number of years after, *Brown* v. *Board of Education*, 347 U. S. 483, was entirely the work of state agents. The authorities' attempt to evade compliance with *Brown* through grossly discriminatory application of the Virginia Pupil Placement law is spread on the record of this case, and recounted in the first opinion of the court below (317 F. 2d 429). In the era before the courts finally denounced use of the "pupil placement laws" to maintain segregation by initial placements based on race and discriminatory transfer procedures for those who sought to escape segregation,[18] segregationist school boards widely proclaimed as the utmost wisdom a judicial declaration that "[s]omebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge" (*Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956)).

Faced with judicial condemnation of their pupil placement scheme, and the knowledge that assignment of chil-

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[18] See, for example, *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962); *Dodson* v. *School Board of City of Charlottesville*, 289 F. 2d 439 (4th Cir. 1961); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 498 (5th Cir. 1962); *Northcross* v. *Board of Education of Memphis*, 302 F. 2d 818 (6th Cir. 1962).

dren by fairly drawn geographic areas in Richmond would result in desegregation of a substantial number of schools and the assignment of white children to Negro schools,[19] the authorities have announced the principle of "free choice." They have done so fortified by the knowledge that social pressure will tend to preserve much of the pattern of segregation, their theory that "99 per cent of the Negro parents . . . prefer . . . the Negro school" (R. II-54), and the continued practice of faculty segregation which proclaims the pattern the state has struggled to preserve, so that no one can mistake a "Negro school" or a "white school."

Faculty segregation is the key factor in the equation. It racially identifies schools as effectively as a sign over the door and enables the plan to offer parents a choice between a Negro-faculty school and a white-faculty school. Continued faculty segregation obviously discourages whites from attending Negro schools no matter how accessible or convenient. The principal implication of segregation practices, that Negroes are considered inferior and unfit to associate with whites, is surely not lost on white parents confronted with a school board policy which indicates by its very existence that the race of teachers makes a difference and is something to be taken into account in organizing schools. Cf. *Anderson* v. *Martin*, 375 U. S. 399. Nor is it lost on Negro parents that the school authorities are moving only grudgingly under pressure, clinging to vestiges of the segregated system to make it clear that at least as a gross proposition Negro pupils enter white schools

[19] See the maps and overlays indicating the number of pupils in various areas of the city discussed in note 10, *supra*.

as unwelcome aliens, and that the school board will never take the initiative to put them there. Negroes know that Negro teachers face a diminishing need for their services to the extent that Negro pupils choose desegregated schools if Negroes are excluded from the possibility of assignments to teach white children. Teachers who are a significant portion of the Negro leadership group are thus faced with a cruel dilemma by the school authorities.

A basic effect of the free choice plan—especially when combined with faculty segregation—is to perpetuate the all-Negro school. The board knows that there are no applications by whites to attend Negro schools. It also knows that although initially white schools have the capacity to absorb some Negro pupils in vacant seats, that capacity is finite and indeed very limited when compared with the total number of Negro pupils. The promise to deal with such an overcrowding by prescribing attendance zones or some geographic standard if more Negroes apply to a white school than it can hold, is no complete answer. It apparently ignores the obligation of the school board to prevent overcrowding in Negro schools by assigning Negro pupils to nearby white schools with vacant space in order to provide an equal educational opportunity in both schools. The school board's theory that it will not force Negro children to go to school with whites and that there is nothing wrong with "voluntary" pupil segregation, coupled with mandatory teacher segregation, runs afoul of its obligation to provide equal educational opportunity without regard to race.

The so-called freedom of choice—joined with staff segregation—plan represents a partial abdication of the school

board's duty to insure equal education by equal utilization and allocation of available facilities. There is no evidence to support, and good reason to doubt, the conclusion of the court below that a free choice plan is "administratively, far easier of accomplishment" than a plan of initially placing pupils in schools. It is as reasonable to think that large numbers of transfers would make planning for the future infinitely more difficult and complicated, and render useless the normal type of projections of school enrollments used in school building plans and the like under the previous zoning system. (See Pl's Ex. 2—the school board's five year projection of enrollments in each school from the 1962-63 to 1966-67 term.) The projected administrative feasibility of the freedom of choice plan seems clearly linked to an expectation that relatively few of the more than 23,000 Negroes in the system will transfer to white schools.

None of the above is intended to deny a school board's abstract, hypothetical, right to adopt a free choice plan in other circumstances. The school board relies on the fact that Baltimore used such a plan. As Judges Sobeloff and Bell pointed out in their concurring opinion, Baltimore had an entirely different official response to the *Brown* decision than Richmond did. And Baltimore, which had free choice before *Brown,* desegregated its faculties.[20] The majority below apparently rejects the suggestion of Judges Sobeloff and Bell that the free choice plan cannot be properly appraised until experience indicates how it works, and seems

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[20] "Statistical Summary of School Segregation—Desegregation," *supra,* p. 31, indicates Baltimore City had 2,052 Negro teachers in desegregated positions.

to decide that the method of allowing parents to choose schools is unobjectionable *per se* and thus it does not matter to what extent the method actually desegregates the school system. It should be noted that the Commissioner of Education, while indicating that freedom of choice plans as well as other types of plans may be submitted to the Office of Education, has served advance notice that actual performance will be a test in evaluating plans to determine if they accomplish the purposes of the Civil Rights Act (General Policy Statement, *supra,* part V. B.(6)), and that periodic compliance reports will be required.

Courts of equity have in other circumstances required wrongdoers to do more than cease their unlawful activities and compelled them to take further affirmative steps to undo the effects of their wrongdoing. This Court only recently approved such a decree in *Louisiana* v. *United States,* 380 U. S. 145, 154, saying:

> [T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Analogies exist under the Sherman Antitrust Act, where unlawful combinations are commonly dealt with through dissolution and stock divestiture decrees (see, e.g. *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 189, and cases cited), and under the National Labor Relations Act where it was early recognized that disestablishment of an employer-dominated labor organization "may be the only effective way of wiping the slate clean and affording the employees an opportunity to start afresh in organizing . . ." (*N. L. R. B.* v. *Newport News Shipbuilding & Dry*

Dock Co., 308 U. S. 241, 250).[21] Similar equitable principles should be applied here where the school board has adopted the method of operation least calculated to extend a desegregated education to large numbers of pupils.

II.

Segregation of Public School Teachers Violates the Fourteenth Amendment and Negro Pupils Are Entitled to Relief Against This Element of Segregated School Systems.

The segregation of public employees by race plainly violates the Fourteenth Amendment under principles settled in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, and the long line of cases applying the Amendment to prohibit all racial discrimination by the states.[22] Discrimi-

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[21] See also *American Enka Corp.* v. *N. L. R. B.*, 119 F. 2d 60, 63 (4th Cir. 1941). In *Sperry Gyroscope Co. Inc.* v. *N. L. R. B.*, 129 F. 2d 922, 931-932 (2nd Cir. 1942), Judge Jerome Frank compared Labor Board orders requiring disestablishment of company-dominated unions to "the doctrine of those cases in which a court of equity, without relying on any statute, decrees the sale of assets of a corporation although it is a solvent going concern, because the past repeated unconscionable conduct of dominating stockholders makes it highly improbable that the improper use of their power will ever cease" (citing cases).

[22] In a unanimous opinion this Court said:

> ". . . [U]nder our more recent decisions any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

Colorado Anti-Discrimination Commission v. *Continental Air Lines*, 372 U. S. 714, 721.

See also, *Johnson* v. *Virginia*, 373 U. S. 61 (courtroom); *Bailey* v. *Patterson*, 369 U. S. 31 (transportation); *Peterson* v. *Greenville*,

nation in the hiring and assignment of public school teachers surely violates the teachers' rights. The defendants cannot seriously contend to the contrary. The only possible justification for withholding relief is that petitioners who are public school pupils are not entitled to invoke the aid of the courts to halt the admittedly unlawful practice. Petitioners submit that the unlawful practice is closely linked to their right under *Brown* v. *Board of Education*, 349 U. S. 297, to have the district courts supervise the effectuation of "a racially nondiscriminatory *school system*" (349 U. S. at 301, emphasis added). The Court in deciding the second *Brown* case, *supra*, pointed to administrative problems related to "the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations . . . ", as matters to be considered in appraising the time necessary for good faith compliance (emphasis added). We believe that the Court plainly regarded the task as one of ending all discrimination in school systems, including discrimination in the transportation system, attendance districts or the other factors mentioned. The delay countenanced by the "deliberate speed" doctrine was predicated on the assumption that dual school systems would be reorganized.

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373 U. S. 244 (restaurant); *Turner* v. *Memphis*, 369 U. S. 350 (airport restaurant); *Browder* v. *Gayle*, 352 U. S. 903 (buses); *Griffin* v. *School Board of Prince Edward County*, 377 U. S. 218 (schools); *Dawson* v. *Baltimore City*, 350 U. S. 877 (municipal beaches); *Holmes* v. *Atlanta*, 350 U. S. 879 (municipal golf courses).

The brief of the United States, as *amicus curiae,* in *Calhoun* v. *Latimer,* 377 U. S. 263, argued in this Court that:

> Obviously, a public school system cannot be truly nondiscriminatory if the school board assigns school personnel on the basis of race. Full desegregation can never be achieved if certain schools continue to have all-Negro faculties while others have all-white faculties. Schools will continue to be known as "white schools" or "Negro schools" depending on the racial composition of their faculties. It follows that the school authorities must take steps to eliminate segregation of personnel as well as pupils. (Brief of the United States, pp. 39-40.)

The Court in *Calhoun* vacated the judgment without discussion of this issue. We submit that this case presents an appropriate occasion to consider this question.

The record indicates the complete segregation of school faculties and the general personnel policies of the school system (see pp. 7-8, *supra*). Virginia law, and the personnel policies of Richmond, authorize the superintendent to assign and reassign teachers and other staff serving the pupils. Code of Va. 1950 (1964 Replacement Vol.), §22-205.[23]

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[23] Section 22-205 provides:

> Assignment of teachers, including principals, by superintendent.—The division superintendent shall have authority to assign to their respective positions in the school wherein they have been placed by the school board all teachers, including principals, and reassign them therein, provided no change or reassignment shall affect the salary of such teachers; and provided, further, that he shall make appropriate reports and explanations on the request of the school board.

Another Virginia law enacted in 1962, Code of Va. 1950 (1964 Replacement Vol.), §22-207, plainly encourages teacher segregation by expressly authorizing teachers to terminate their contracts with school boards if pupils or teachers at their schools are desegregated.[24] This law, plainly enacted in defiance of *Brown,* shows the link between teacher and pupil segregation in segregationists' thinking.

But the Fourth Circuit has not stated its disapproval of faculty segregation in any of the cases in which it has considered the matter[25] and apparently has adopted the view

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[24] §22-207. Written contracts with teachers required; termination by teachers.—Written contracts shall be made by the school board with all public school teachers, except those temporarily employed as substitute teachers, before they enter upon their duties, in a form to be prescribed by the Superintendent of Public Instruction. Such contracts shall be signed in duplicate, each party holding a copy thereof.

Every such contract hereafter entered into, whether or not expressly provided therein, may be terminated by the teacher, by notice in writing to the local school board, *at any time after both white and Negro pupils shall have been enrolled, or both white and Negro teachers shall have been employed,* in the school to which the contracting teacher is assigned. (Emphasis supplied.)

(The second paragraph was added by a 1962 amendment; Acts of Va. 1962, chapter 183.)

[25] Faculty segregation was first considered by the Fourth Circuit in *Jackson* v. *School Board of the City of Lynchburg,* 321 F. 2d 230, 233 (4th Cir. 1963), where it held that a complaint asking for desegregation of a school system was sufficient to raise the question. See also, *Griffin* v. *Board of Supervisors,* 339 F. 2d 486, 493 (4th Cir. 1964); *Bowditch* v. *Buncombe County Board of Ed.,* 345 F. 2d 329, 332, 333 (4th Cir. 1965); *Wheeler* v. *Durham City Board of Education,* —— F. 2d —— (4th Cir. No. 9630, June 1, 1965), and *Gilliam* v. *School Board of City of Hopewell,* 345 F. 2d 325 (4th Cir. 1965).

In the Fifth Circuit see: *Board of Public Instruction of Duval County* v. *Braxton,* 326 F. 2d 616, 620 (5th Cir. 1964), *cert.*

that faculty desegregation must depend upon some kind of evidentiary showing by plaintiff Negro pupils that they are disadvantaged by the practice in the circumstances of the particular case. That is the only reasonable explanation for the Fourth Circuit's repeated statements in cases where the existence of faculty segregation is undisputed, that there was insufficient showing that faculty segregation was a denial of plaintiffs' constitutional rights. The Fourth Circuit apparently accepts the standing of pupils to litigate the question but demands that they prove that faculty segregation is a discrimination against them—as opposed to a discrimination against the teachers themselves.

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denied 377 U. S. 924 (affirming a trial court order requiring a faculty desegregation plan). See also *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (5th Cir. 1962); *Calhoun* v. *Latimer*, 321 F. 2d 302 (5th Cir. 1963), *vacated and remanded* 377 U. S. 263.

The Sixth Circuit has twice held that it was proper for pupils and their parents to raise the issue of segregation of teachers. *Mapp* v. *Board of Education of City of Chattanooga*, 319 F. 2d 571, 576 (6th Cir. 1963); *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 666 (6th Cir. 1964).

Several other courts have discussed the question of segregation of teachers with a variety of results. *Brooks* v. *School District of City of Moberly, Mo.*, 267 F. 2d 733 (8th Cir. 1959), *cert. denied* 361 U. S. 894 (1959) (teacher firing); *Franklin* v. *County Scool Board of Giles County*, Civil No. 64-C-73-R, W. D .Va., June 3, 1965 (same); *Christmas* v. *Board of Education of Harford County*, 231 F. Supp. 331 (D. Md. 1964); *Nesbit* v. *Statesville City Board of Education*, 232 F. Supp. 288 (W. D. N. C. 1964), vacated, 345 F. 2d 333 (4th Cir. 1965); *Tillman* v. *Board of Instruction of Volusia County, Florida*, Civil No. 4501, 7 Race Rel. L. Rep. 687 (S. D. Fla. 1962); *Manning* v. *Board of Public Instruction of Hillsborough County, Fla.*, Civil No. 3554, 7 Race Rel. L. Rep. 681 (S. D. Fla. 1962); *Lawrence* v. *Bowling Green, Ky. Board of Education*, Civil No. 819, 8 Race Rel. L. Rep. 74 (N. D. Ky. 1963); *Mason* v. *Jessamine County, Ky. Board of Education*, Civil No. 1496, 8 Race Rel. L. Rep. 75 (E. D. Ky. 1963); *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (N. D. Okla. 1963).

But, as Judges Sobeloff and Bell have said, faculty segregation obviously makes student desegregation more difficult. To the extent that students or parents are given a choice between schools, faculty segregation encourages them to make their choice on a racial basis. The very existence of faculty segregation reflects the school authorities' judgment that the race of teachers is significant and makes a difference. Cf. *Anderson* v. *Martin,* 375 U. S. 399. This is obvious in the context of states where school segregation has been defended vigorously by public officials for a decade since *Brown.*

Faculty segregation assures continuance of the prevailing trend of one-way desegregation, i.e., movement of Negro pupils to formerly white schools without any corresponding movement of white pupils to Negro faculty schools. Throughout the southeast part of the country there are few exceptions to this brand of "desegregation" which leaves the "Negro" school intact with an all-Negro student body and faculty.[26] If the established trend continues it may have extraordinarily serious implications threatening the jobs of large numbers of Negro teachers. They are not assigned to teach white pupils and face the departure of some Negro pupils to white-faculty schools, with a corresponding decrease in demand for their services. A recent decision by Judge Michie in the Western District of Virginia enjoined school authorities who discharged every Negro teacher in a small system when the schools desegregated (*Franklin* v. *School Board of Giles County,* —— F.

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[26] See the comprehensive statistics published by the Southern Education Reporting Service in its periodic "Statistical Summary of School Segregation—Desegregation in the Southern and Border States," 14th Revision, November 1964, *passim.*

Supp. ——, W. D. Va., Civ. No. 64-C-73-R, June 3, 1965). Cases involving Negro teacher discharges coincident with desegregation are pending in district courts in North Carolina, Texas and Oklahoma.

The public importance of the issue is illuminated perhaps by consideration of some societal factors involved. It is estimated that there are 419,199 white teachers and 116,028 Negro teachers in 11 southern states, 6 border states (excluding Maryland) and the District of Columbia.[27] In 1963-64, Virginia public schools employed 31,443 white teachers and 9,051 Negro teachers.[28] There were 733,524 white pupils and 34,176 Negro pupils (total 967,700).[29] Of 128 districts with Negro and white pupils, 81 districts had at least one Negro pupil in school with whites in November 1964, but only five of those districts had Negroes teaching in school with whites.[30] There was no faculty desegregation in Alabama, Georgia, Louisiana, Mississippi and South Carolina.[31] One North Carolina district, 2 Florida districts, and 7 Tennessee districts had some faculty desegregation, and one Arkansas district had a Negro supervisor of elementary schools but no Negro teachers in desegregated classes.[32]

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[27] Southern Education Reporting Service, Statistical Summary of School Segregation-Desegregation (cited *supra*, note 12) (Nov. 1964), p. 2.

[28] *Id.* at 59.

[29] *Ibid.*

[30] *Ibid.* The summary reports: "Some Negro teachers are teaching in schools with whites in Alexandria and Roanoke, and in Arlington and Fairfax Counties. In Prince Edward County, nine of the 68 teachers in the county's one high school and three elementary schools are white."

[31] *Id.* at 2.

[32] *Id.* at 8, 15, 39, 50.

There has been a prolonged national shortage of teachers and the supply of new teachers does not meet the demand.[33] This pattern holds true in Virginia.[34] The N. E. A. Research Division conservatively estimates the national teacher turnover rate at 8.5 percent of teachers withdrawing from teaching annually.[35]

Within the Negro community Negro teachers generally are recognized as having a leadership role with a comparatively high economic position,[36] but their potential as leaders in efforts to promote desegregation of public facilities and schools is limited by the vulnerability of their position as employees of segregationist state agencies.[37] Continued faculty segregation, posing the danger of discharge

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[33] Research Division—National Education Association, Teacher Supply and Demand in Public Schools, 1965 (Research Report 1965-R10, June 1965), *passim*.

[34] *Id.* at 57.

[35] *Id.* at 29.

[36] According to the 1960 census the median income for the non-white family was $3,662, but the median for the non-white family whose head was employed as an elementary or secondary teacher was $6,409 (1960 Census of Population, Vol. I, "Characteristics of the Population," Part I, U. S. Summary, Table 230, pp. 1-611).

[37] Lamanna, Richard A., "The Negro Teacher and Desegregation", Sociological Inquiry, Vol. 35, No. 1, Winter 1965. Alabama has enacted 7 laws to permit firing of teachers who advocate desegregation (1956 1st Sp. Sess., Acts 40, 41; 1957 Sess., Act 239, 361; 1961 Sp. Sess., Acts 249, 383, 443). Arkansas laws prohibited NAACP members from holding public employment and required teachers to list organization membership until *Shelton* v. *Tucker*, 364 U. S. 479. A series of Louisiana laws provided for dismissal of public employees advocating integration (La. Acts 1956, Acts 248, 249, 250, 252). Until challenged in court South Carolina barred public employment of NAACP members (S. C. Acts 1956, Act 741), repealed by Act 223 of 1957. See *Bryan* v. *Austin*, 148 F. Supp. 563 (E. D. S. C. 1957), judgment vacated 354 U. S. 933.

of Negro teachers as Negro pupils go to white schools where no Negro teachers are assigned threatens potentially disastrous social consequences for one of the most important social and economic groups in Negro communities in the South.

Petitioners submit that faculty segregation *per se* violates the constitutional rights of Negro pupils because of its inevitable tendency to impede desegregation of pupils. In recognition of this the United States Commissioner of Education, implementing Title VI of the Civil Rights Act of 1964,[38] has announced the following ruling to all school districts submitting plans for desegregation in order to qualify for federal financial aid (General Policy Statement, *supra*, Part V. B.):

> 1. *Faculty and staff desegregation.* All desegregation plans shall provide for the desegregation of faculty and staff in accordance with the following requirements:
>
> a. *Initial assignments.* The race, color, or national origin of pupils shall not be a factor in the assignment to a particular school or class within a school of teachers, administrators or other employees who serve pupils.
>
> b. *Segregation resulting from prior discriminatory assignments.* Steps shall also be taken toward the elimination of segregation of teaching and staff personnel in the school resulting from prior assignments based on race, color, or national origin (see also, V. E. 4(b)).

[38] 42 U. S. C. A. §2000d.

The General Policy Statement also indicates that it will not accept an "Assurance of Compliance" (HEW Form 441) from any school system in which "teachers or other staff who serve pupils remain segregated." We submit that the determination by the United States Commissioner of Education that faculty desegregation must be included in order for a desegregation plan to be "adequate to accomplish the purposes of the Civil Rights Act" is entitled to substantial weight. But beyond that the Commissioner's determination implements the clear intent of the Congressional proponents of Title VI. See Vice President (then Senator) Humphrey's interpretation of Title VI quoted *supra*, pp. 17-18.

The Fourth Circuit has not indicated that there is any justification for the policy of assigning teachers on the basis of the race of the pupils, and the school authorities have not suggested any. Nor have the school authorities made any effort to establish that there are administrative obstacles to faculty desegregation justifying delay under the doctrine of the second *Brown* decision (349 U. S. at 300-01).

A policy of assigning teachers to schools on the basis of the race of the pupils is plainly invidious even without regard to its effect on what schools various pupils attend. Pupils admitted to public schools are entitled to be treated alike without racial differentiations in those schools. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. The student's relationship with teachers is central to the educational experience in public schools. When a state decrees that those Negro pupils in all-Negro schools be taught only by Negro teachers and that those Negro pupils in schools

with white children be taught only by white teachers, it significantly perpetuates the segregation of Negro Americans in their educational experience. This is contrary to the egalitarian principle of the Fourteenth Amendment and the teaching of *Brown* that segregated education is "inherently unequal."

The issues presented by the "freedom of choice" plans and the faculty segregation issue merge into a common problem of vital importance to the implementation of the *Brown* decision, and are worthy of the attention of this Court.

CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, N. Y. 10019

S. W. TUCKER
HENRY L. MARSH, III
214 East Clay Street
Richmond 19, Virginia

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APPENDIX

Memorandum of the Court

[July 25, 1962]

Eleven Negro students, their parents and guardians instituted this action to require the defendants to transfer the students from Negro public schools to white public schools. The plaintiffs also pray, on behalf of all persons similarly situated, that the defendants be enjoined from operating racially segregated schools and that the defendants be required to submit to the Court a plan of desegregation.

The Pupil Placement Board answered, admitting that the plaintiffs had complied with its regulations for transfer and denying the other allegations of the complaint. The City School Board and the Superintendent of Schools answered and moved to dismiss on the ground that sole responsibility for the placement of pupils rested with the Pupil Placement Board pursuant to the Pupil Placement Act of Virginia, Sections 22-232.1 through 232.17 of the Code of Virginia, as amended.

The defendants interpreted the bill of complaint as attacking the constitutionality of the Pupil Placement Act and moved to dismiss on the ground that its constitutionality should first be determined by the Supreme Court of Appeals of Virginia, or the case should be heard by a district court of three judges.

The evidence disclosed that the City of Richmond is divided into a number of geographically defined attendance areas for both white and Negro schools. These areas were established by the School Board prior to 1954 and have not

been changed in a material way since that time. Several areas for white and Negro schools overlap. The Pupil Placement Board enrolls and transfers all students. Neither the Richmond School Board nor the Superintendent makes recommendations to the Pupil Placement Board.

During the 1961-1962 school term, thirty-seven Negro students were assigned to white schools. For the 1962-1963 school term, ninety additional students have been assigned. At the start of the 1962-1963 school term all of the white high schools will have Negro students in attendance. Negro students will also attend several of the white junior high schools and elementary schools.

Rigid adherence to placement of students by attendance areas has been modified in four respects. First, the Chairman of the Pupil Placement Board testified that any Negro child applying for enrollment in the first grade of a white public school in his attendance area is assigned to that school. Second, the Superintendent of Schools testified that George Wythe High School and John Marshall High School had been constructed to accommodate all high school students in their respective attendance areas. Counsel stated in argument that six Negro students had applied for admission to George Wythe High School for 1962 and all had been accepted. Third, a Negro student presently attending a white school, upon promotion to a higher school, is routinely assigned to a white school. Fourth, some Negro students have been assigned to schools in white attendance areas.

Usually, however, assignments of students based on promotion from an elementary school to a junior high school

and from junior high to high school are routinely made by the Pupil Placement Board. These assignments generally follow a pattern, aptly described as a system of "feeder schools," that existed prior to 1954. Thus, a student from a white elementary school is routinely promoted to a white junior high school and in due course to a white high school. A Negro student is routinely promoted from a Negro elementary school to a Negro junior high school and finally a Negro high school. In order to change the normal course of assignment based on promotion all students must apply to the Pupil Placement Board. The majority of the plaintiffs in the present case are such applicants.

The Chairman of the Pupil Placement Board testified that 98 per cent of the applications were of a routine nature and were handled by the staff of the Board. The remaining 2 per cent, divided about equally between white and Negro applicants, requested transfers from one school to another outside of the regular routine. These percentages applied to the entire state, but there was no evidence that they varied materially for the City of Richmond.

First to be determined are the defendants' motions to dismiss on the ground that the case involves the constitutionality of the Pupil Placement Act. The plaintiffs have made no challenge of the constitutionality of the Act, and the motions are denied.

The second issue is the joinder of the School Board and Superintendent of Schools. The State Pupil Placement Board has authority over the placement of pupils, and the local officials refrain from making recommendations to the Board, but approximately 98 per cent of the placements

are made routinely as a result of the regulations of the School Board pertaining to attendance areas. The evidence shows that the State Pupil Placement Board has no inclination to vary these attendance areas, although undoubtedly it has authority to do so. In view of this situation, the School Board and the Superintendent of Schools are proper parties.

The next issue concerns the plaintiffs' applications. The Court was advised that Lemuel Wimbish, Jr. has been assigned to Chandler Junior High School to which he had made application. His case is moot.

The following students who have completed elementary school seek admission to Chandler Junior High School: Carolyn Bradley, Rosalind Dobson, John Edward Johnson, Jr., and William Dunbar Quarles, Jr.

The State Pupil Placement Board, after comparing test scores of these students with test scores of other students, denied the applications on the ground of lack of academic qualifications. The plaintiffs do not challenge the tests or the method of comparison used by the State Pupil Placement Board. The plaintiffs emphasize, however, that students from white elementary schools in the same attendance area are placed routinely in Chandler Junior High School, and their scores are not scrutinized by the State Pupil Placement Board. On the other hand, the plaintiffs, because they sought transfer based on promotion from a Negro elementary school, are screened by the State Pupil Placement Board. This is a valid criticism of the procedure inherent in the system of "feeder schools."

Proper scholastic tests may be used to determine the placement of students. But when the tests are applied only to Negroes seeking admission to particular schools and not to white students routinely assigned to the same schools, the use of the tests cannot be sustained. *Jones* v. *School Board of Alexandria,* 278 F. 2d 72 (4th Cir. 1960).

Plaintiff, Morgan N. Jackson, who was promoted from Graves Junior High School, seeks admission to John Marshall High School. His application was denied because he lives thirteen blocks from the John Marshall High School and five blocks from a Negro high school. The plaintiffs point out that he lives in the attendance area of John Marshall High School, and had he been a white student he would have been routinely assigned to John Marshall High School without determination of whether his residence was closer to that high school or any other high school. Residence may be a proper basis for assignment of pupils, but it is an invalid criteria when linked to a system of "feeder schools." *Dodson* v. *School Board of the City of Charlottesville,* 289 F. 2d 439 (4th Cir. 1961).

The third group of plaintiffs, namely, Michael Bradley, Daria A. Cameron, Bruce W. Johnson, Phyllis Antoinette Johnson and Robert S. Meyers, seek to transfer from Graves Junior High School to Chandler Junior High School. They were denied transfer because of lack of academic qualifications. The evidence showed that the same standards for determining transfer from one junior high school to another junior high school were applied by the Board indiscriminately to both white and colored students. Were this the only factor in this phase of the case, the issue

would involve only judicial review of the decision of an administrative board. However, the situation of these plaintiffs must be considered in the context of the system of "feeder schools," which routinely placed them in the Graves Junior High School while white students routinely were placed in Chandler Junior High School. The application of scholarship qualifications under these circumstances is discriminatory. *Green* v. *School Board of the City of Roanoke,* —— F. 2d —— (4th Cir., May 22, 1962).

The foregoing facts and conclusions of law require the admission of the plaintiffs to the schools for which they made application.

The plaintiffs prayed that the defendants be enjoined from continued discrimination in the city schools and that the School Board be required to submit a desegregation plan. The Court has weighed all of the factors presented by the evidence in this case and finds that the defendants have taken measures to eliminate racially discriminatory enrollments in the first grade. Apparently they are eliminating discriminatory enrollments in George Wythe High School and they are routinely assigning Negro students in white junior high schools to white high schools.

While the School Board has not presented a formal plan of desegregation, the Court finds that the defendants have made a reasonable start toward a non-discriminatory school system resulting in the attendance of 127 Negro students in white schools for the 1962-1963 school term. In view of the steps that have been taken in this direction, the Court concludes that the defendants should be allowed discretion

to fashion within a reasonable time the changes necessary to eliminate the remaining objectionable features of the system of "feeder schools."

In *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955), the Supreme Court stated "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." The Court is of the opinion that the relief decreed in this case is sufficient at this time in view of the evidence presented. The refusal of broad injunctive relief now is not to be construed as approval to continue the "feeder school system" as it is now operated. See *Hill* v. *School Board of the City of Norfolk, Virginia*, 282 F. 2d 473 (4th Cir. 1960); *Dodson* v. *School Board of the City of Charlottesville*, 289 F. 2d 439 (4th Cir. 1961).

This case will be retained on the docket for such further relief as may be appropriate.

JOHN D. BUTZNER, JR.
United States District Judge

Richmond, Virginia
July 25, 1962

Decree

This cause came on to be heard upon the bill of complaint, the amended complaint, the several motions to dismiss and answers filed by the Pupil Placement Board of the Commonwealth of Virginia and the School Board of the City of Richmond and the Division Superintendent of Schools, the depositions of witnesses duly taken and filed, the testimony of witnesses heard ore tenus and exhibits; and was argued by counsel.

Upon consideration whereof, for reasons appearing in the Memorandum of the Court this day made a part of the record, the Court doth ADJUDGE, ORDER and DECREE as follows:

1. The motions to dismiss are denied.

2. The defendants, and each of them, are enjoined and restrained from denying Carolyn Bradley, Michael Bradley, Daria A. Cameron, Rosalind Dobson, Bruce W. Johnson, John Edward Johnson, Jr., Phyllis Antoinette Johnson, Robert S. Meyers and William Dunbar Quarles, Jr., admission to Chandler Junior High School, and from denying Morgan N. Jackson admission to John Marshall High School.

3. The prayer of the plaintiffs for further injunctive relief is denied at this time.

4. This cause is retained on the docket, with leave of any party, or of persons constituting a class with the plaintiffs, to petition for appropriate relief.

JOHN D. BUTZNER, JR.
United States District Judge

Richmond, Virginia
July 25, 1962

Opinion of Boreman, *U.S.C.J.*

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

No. 8757

Argued Jan. 9, 1963

Decided May 10, 1963

MINERVA BRADLEY, I. A. JACKSON, JR., ROSA LEE QUARLES, JOHN EDWARD JOHNSON, ELIHU C. MYERS and ELIZABETH S. MYERS,

Appellants,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, H. I. WILLET, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. OGLESBY, ALFRED L. WINGO and E. T. JUSTIS, individually and constituting the Pupil Placement Board of the Commonwealth of Virginia,

Appellees.

Henry L. Marsh, III, Richmond, Va. (S. W. Tucker, Richmond, Va., on brief) for appellants.

Henry T. Wickham, Sp. Counsel, City of Richmond J. Elliott Drinard, City Atty., Richmond, Va. and Tucker, Mays, Moore & Reed, Richmond, Va., on brief) for appellees, The School Board of the City of Richmond, Virginia, and H. I. Willet, Division Superintendent of Schools.

Before BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges.

BOREMAN, Circuit Judge:

This is a school case involving alleged racially discriminatory practices and the maintenance of public schools on a racially segregated basis in the City of Richmond, Virginia. In September 1961 eleven Negro pupils, their parents and guardians instituted this action to require the defendants to transfer the pupils from Negro public schools to white public schools.[1] The plaintiffs also pray, on behalf of all persons similarly situated, that the defendants be enjoined from operating racially segregated schools and be required to submit to the District Court a plan of desegregation. The District Court ordered that the individual infant plaintiffs be transferred to the schools for which they had applied. This appeal is based upon the refusal of the court to grant further injunctive relief.

Defendant, Virginia Pupil Placement Board, answered the complaint, admitting that plaintiffs had complied with its regulations pertaining to applications for transfer but denying discrimination and other allegations of the complaint. The defendants, School Board of the City of Richmond and the Richmond Superintendent of Schools, answered and moved to dismiss on the ground that sole responsibility for the placement of pupils rested with the Virginia Pupil Placement Board pursuant to the Pupil

[1] Of eleven original pupil plaintiffs, one was assigned by the Pupil Placement Board to an integrated Junior High School to which he had made application before the hearing in the District Court. His case became moot.

Placement Act of Virginia, Sections 22-232.1 through 232.17, Code of Virginia, 1950, as amended.[2]

The defendants interpreted the bill of compaint as attacking the constitutionality of the Pupil Placement Act and the motions to dismiss were grounded also on the theory that constitutionality should first be determined by the Supreme Court of Appeals of Virginia or the case should be heard by a District Court of three judges. The court below correctly denied the motions to dismiss after determining that the constitutionality of the Act had not been challenged by plaintiffs.

The record discloses that the City of Richmond is divided into a number of geographically defined attendance areas for both white and Negro schools. These areas were established by the School Board prior to 1954 and have not been materially changed since that time. It is admitted that several attendance areas for white and Negro schools overlap. The State Pupil Placement Board enrolls and transfers all pupils and neither the Richmond School Board nor the city Superintendent of Schools makes recommendations to the Pupil Placement Board.

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[2] Raised below (but not involved in this appeal) was the issue as to the joinder of the Richmond School Board and Superintendent of Schools as parties defendant. Correctly, we think, the District Court held:

> "* * * The State Pupil Placement Board has authority over the placement of pupils, and the local officials refrain from making recommendations to the Board, but approximately 98 per cent of the placements are made routinely as a result of the regulations of the School Board pertaining to attendance areas. The evidence shows that the State Pupil Placement Board has no inclination to vary these attendance areas, although undoubtedly it has authority to do so. In view of this situation, the School Board and the Superintendent of Schools are proper parties."

During the 1961-62 school term, 37 Negro pupils were assigned to "white" schools. For the 1962-63 school term, 90 additional Negro pupils had been so assigned. At the start of the 1962-63 school term, all of the "white" high schools had Negro pupils in attendance. Negro pupils also attend several of the "white" junior high schools and elementary schools.

Certain additional facts are clearly established by the record. The City School Board maintains five high schools, three for whites and two for Negroes; five junior high schools for whites and four for Negroes; eighteen elementary schools for whites and twenty-two for Negroes. As of April 30, 1962, there were 40,263 pupils in Richmond public schools, 23,177 Negroes, 17,002 whites and 84 non-whites of a race other than Negro but considered white for the purpose of assignment in the Richmond public school system. Only 37 Negroes were then attending schools which white children attended, 30 of those being in the "white" Chandler Junior High School. Three of the remaining seven were in attendance at the "white" John Marshall High School, one attended the "white" Westhampton Junior High School and three handicapped children attended the Richmond Cerebral Palsy Center. With the possible exception of the three last mentioned, these children had sought transfers from Negro schools and all but one were able to satisfy the residential and academic criteria which the Pupil Placement Board applies in case of transfers but not in case of initial enrollment. The remaining child had been admitted by court order in earlier litigation.[3]

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[3] On September 2, 1958, a suit styled *Lorna Renee Warden et al.* v. *The School Board of the City of Richmond, Virginia, et al.* was

The 1961-62 Directory of the Richmond, Virginia, Public Schools shows "White Schools" in one division and "Negro Schools" in the other. The "White Schools" are staffed entirely with faculties and officials of the Caucasian race. The schools listed as "Negro Schools" are staffed entirely with faculties and officials of the Negro race.

Thus it is clear, as found by the District Court, that Richmond has dual school attendance areas; that the City is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until graduation from that school. Upon graduation, the pupils are assigned in the manner found by the District Court to be as follows:

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instituted in the District Court, praying, *inter alia*, that a permanent injunction be entered restraining the Richmond School Board and its division Superintendent of Schools from any and all actions that regulate or affect, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similarly situated, to and in any public school operated by the defendants.

That suit was decided on July 5, 1961. The District Court ordered that the then one remaining Negro plaintiff be transferred from the Negro school located five miles from her home and admitted to the white school in her neighborhood. However, the court denied class relief, stating: "There is no question as to the right of the infant plaintiff to be admitted to the schools of the City of Richmond without discrimination on the ground of race. She is admitted, however, as an individual, not as a class or group; and it is as an individual that her rights under the Constitution are asserted."

The court refused to grant a permanent injunction and dismissed the case from the docket.

"* * * [A]ssignments of students based on promotion from an elementary school to a junior high school and from a junior high school to high school are routinely made by the Pupil Placement Board. These assignments generally follow a pattern, aptly described as a system of 'feeder schools', that existed prior to 1954. Thus, a student from a white elementary school is routinely promoted to a white junior high school and in due course to a white high school. A Negro student is routinely promoted from a Negro elementary school to a Negro junior high school and finally a Negro high school. In order to change the normal course of assignment based on promotion all students must apply to the Pupil Placement Board. The majority of the plaintiffs in the present case are such applicants."

As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond Negro public schools. Of the 28 Negro schools, 22 were overcrowded beyond normal capacity by 1775 pupils and the combined enrollments of 23 of the 26 white schools were 2445 less than the normal capacity of those schools. For the current 1962-63 school term, the applications for transfers from Negro to white schools of only 127 Negro pupils had been granted.

Four of the infant plaintiffs, who had completed elementary school, sought admission to the white Chandler Junior High School. After comparing test scores of these pupils with test scores of other pupils, the Pupil Placement Board denied the applications on the ground of lack of academic qualifications. These plaintiffs contended that pupils from white elementary schools in the same attendance

area are routinely placed in Chandler Junior High and their scholastic attainments or qualifications are not scrutinized by the Pupil Placement Board. The District Court concluded that academic criteria were applied to Negro pupils seeking transfer based on promotion, which criteria were not applied to the white pupils promoted from elementary schools to junior high schools. This, said the court, is discriminatory and is a valid criticism of the procedure inherent in the system of "feeder schools". The court further stated:

> "Proper scholastic tests may be used to determine the placement of students. But when the tests are applied only to Negroes seeking admission to particular schools and not to white students routinely assigned to the same schools, the use of the tests can not be sustained. Jones v. School Board of the City of Alexandria, 278 F. 2d 72 (4th Cir. 1960)."

Another of the Negro plaintiffs, who was promoted from a Negro junior high school, sought admission to the "white" John Marshall High School. His application had been denied because he lived thirteen blocks from the John Marshall High School and only five blocks from a Negro high school. However, it was pointed out in the court below that this plaintiff lives in the attendance area of the John Marshall High School and, had he been a white student, he would have been routinely assigned there without considering the distance of his residence from that school or from another high school. The District Court said: "* * * Residence may be a proper basis for assignment of pupils, but it

is an invalid criteria when linked to a system of 'feeder schools'. Dodson v. School Board of the City of Charlottesville, 289 F. 2d 439 (4th Cir. 1961)."

The remaining five plaintiffs sought transfers from the Graves Junior High School (Negro) to the "white" Chandler Junior High School. They were denied transfer by the Pupil Placement Board because of lack of academic qualifications. The evidence showed that the same standards for determining transfers, upon application, from one junior high school to another junior high school were applied by the Board indiscriminately to both white and Negro pupils. The District Court stated:

> "* * * Were this the only factor in this phase of the case, the issue would involve only judicial review of the decision of an administrative board. However, the situation of these plaintiffs must be considered in the context of the system of 'feeder schools', which routinely placed them in the Graves Junior High School while white students routinely were placed in Chandler Junior High School. The application of scholarship qualifications under these circumstances is discriminatory. Green v. School Board of the City of Roanoke [304] F. 2d [118] (4th Cir., May 22, 1962)."[4]

With respect to a determination of the rights of all of the infant Negro plaintiffs, the District Court held:

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[4] The case to which the District Court referred is styled *Green v. School Board of City of Roanoke, Virginia,* and is now reported in 304 F. 2d 118.

"The foregoing facts and conclusions of law require the admission of the plaintiffs to the schools for which they made application."

An appropriate order was entered enjoining and restraining the defendants from denying the infant plaintiffs, therein named, admission to the schools for which they had made application. The defendants have not appealed from this order.

It follows that each infant plaintiff has been granted the relief which he or she individually sought. But the District Court, although expressing its disapproval of the "feeder school system" as now operating in the City of Richmond, denied further injunctive relief. The case was ordered retained on the docket for such further relief "as may be appropriate".[5]

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[5] In its written opinion the District Court stated as follows:

"The plaintiffs prayed that the defendants be enjoined from continuing discrimination in the city schools and that the School Board be required to submit a desegregation plan. The Court has weighed all of the factors presented by the evidence in this case and finds that the defendants have taken measures to eliminate racially discriminatory enrollments in the first grade. Apparently they are eliminating discriminatory enrollments in George Wythe High School [white] and they are routinely assigning Negro students in white junior high schools to white high schools.

"While the School Board has not presented a formal plan of desegregation, the Court finds that the defendants have made a reasonable start toward a nondiscriminatory school system resulting in the attendance of 127 Negro students in white schools for the 1962-1963 school term. In view of the steps that have been taken in this direction, the Court concludes that the defendants should be allowed discretion to fashion within a reasonable time the changes necessary to eliminate the remaining objectionable features of the system of 'feeder schools'.

(footnote continued on following page)

The conclusion of the District Court that a "reasonable start toward a non-discriminatory school system" had been made appears to have been based primarily upon consideration of four factors discussed in its opinion as follows:

> "Rigid adherence to placement of students by attendance areas has been modified in four respects. First, the Chairman of the Pupil Placement Board testified that any Negro child applying for enrollment in the first grade of a white public school in his attendance area is assigned to that school. Second, the Superintendent of Schools testified that George Wythe High School and John Marshall High School had been constructed to accommodate all high school students in their respective attendance areas. Counsel stated in argument that six Negro students had applied for admission to George Wythe High School for 1962 and all had been accepted. Third, a Negro student presently attending a white school, upon promotion to a higher school, is routinely assigned to a white school. Fourth,

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"In Brown v. Board of Education, 349 U. S. 294, 300 [75 S. Ct. 753, 99 L. Ed. 1083] (1955), the Supreme Court stated 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' The Court is of the opinion that the relief decreed in this case is sufficient at this time in view of the evidence presented. The refusal of broad injunctive relief now is not to be construed as approval to continue the 'feeder school system' as it is now operated. See Hill v. School Board of the City of Norfolk, Virginia, 282 F. 2d 473 (4th Cir. 1960); Dodson v. School Board of the City of Charlottesville, 289 F. 2d 439 (4th Cir. 1961).

"This case will be retained on the docket for such further relief as may be appropriate."

some Negro students have been assigned to schools in white attendance areas."

In the context of this case the principal questions to be determined may be stated as follows: (1) Are these four basic factors cited by the District Court sufficient to evidence a reasonable start toward maintaining a non-discriminatory school system and consistent with the true concept of equal constitutional protection of the races; and (2) should the court have granted further injunctive relief? We think question (1) must be answered in the negative and question (2) in the affirmative in view of the discriminatory attitude displayed by the Pupil Placement Board toward the transfers sought by the infant plaintiffs in the instant case and which transfers, denied as the result of discriminatory application of residential and academic criteria, were effected only through this protracted litigation.

It is notable that there is no assertion here, as in some of the other school cases, of a defense based upon a claim that a reasonable start has been made toward the elimination of racially discriminatory practices coupled with a suggestion that additional time, consistent with good faith compliance at the earliest practicable date, is necessary in the public interest. Instead, the answer of the City school authorities denied that anything done or omitted by them had given rise to the present litigation. The answer of the Pupil Placement Board admitted that the plaintiffs had complied with its administrative procedures but denied and demanded strict proof of racial discrimination.

One of the interrogatories served by the plaintiffs was: "What obstacles, if any, are there which will prevent the

racially non-discriminatory assignment of students to public schools in the City of Richmond at the commencement of the 1962-1963 school session?". The local school authorities side-stepped the question by claiming to be unable to answer because all power to assign students to schools had been vested by law in the Pupil Placement Board. That Board replied to the interrogatory as follows: "* * * [T]hat to the extent that such question implies discrimination, such implication is denied and that such question lacks sufficient specificity to evoke an intelligent answer which does not involve broad conclusions or have argumentative deductions. Aside from that, and under Brown v. Board of Education, *these defendants know of no reason why students should not be assigned to public schools without discrimination on the ground of race, color, or creed.*" (Emphasis added.)

The Superintendent of Schools testified that the City School Board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils. He stated that some new schools and additions to existing schools had been provided. The record discloses that the earlier litigation, Warden v. The School Board of the City of Richmond, referred to in our footnote 3, was instituted on September 2, 1958. At a special meeting held on September 15, 1958 (approximately two weeks after the beginning of the school term), the School Board voted to request the Pupil Placement Board to transfer the pupils then attending the Nathaniel Bacon School (white) to the East End Junior High School (white), and that a sufficient number of pupils be transferred from the George Mason

(Negro) and Chimborazo (Negro) schools to the Nathaniel Bacon building to utilize its capacity, thus converting Nathaniel Bacon to a Negro school.

The attitude of the City school authorities, as disclosed by the Superintendent of Schools in his testimony, is and has been "that the state law took out of the hands of the School Board and the Superintendent of Schools any decision relating to the integration of schools [and that] * * * it has been a feeling of both the School Board and the Administration that any conflict that might exist between the state and federal law should be decided by the Courts, not by the School Board and the Administration."

The following is taken from the testimony of the Chairman of the Pupil Placement Board:

> "Q. Well, what do you do where you have overlapping school zones and school areas?
>
> "A. You have got that, of course, in Richmond.
>
> "Q. Yes.
>
> "A. Normally, I would say fully 99 per cent of the Negro parents who are entering a child in First Grade prefer to have that child in the Negro school. Judging by the small number of applications we get, that must be true. Now, we do not think that this Board was appointed for the purpose or that the law required the attempt on our part to try to integrate every child possible. What we thought we were to do was to be completely fair in considering the requests of Negroes, we will say, to go into White schools, but certainly not trying to put those in that didn't want to go in.

"Now, when a Negro parent asks for admission of his child in the First Grade of a White school, very clearly he is asking for desegregation or for integration, or whatever you want to call it, and he gets it. And it is true that *in general there will be two schools that that child could attend in his area, one White and one Negro, and we assume that the Negro wants to go to the Negro school unless he says otherwise,* but if he says otherwise, he gets the other school." (Emphasis supplied.)

It is true that the authority for the enrollment and placement of pupils in the State of Virginia has been lodged in the Pupil Placement Board[6] unless a particular locality elects to assume sole responsibility for the assignment of its pupils.[7] The School Board of the City of Richmond has assumed no responsibility whatever in this connection. It does not even make recommendations to the Pupil Placement Board as to enrollments, assignments or transfers of pupils. It here defends charges against it of racial discrimination in the operation of the City's schools on the ground that the sole responsibility is that of the State Board. At the same time the system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue. Though many of the Negro schools are overcrowded and white schools are not filled to normal capacity, the only effort to alleviate this condition has been to provide new buildings or additions to existing buildings, a move ob-

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[6] Va. Code Ann. §§22—232.1-232.17 (Supp. 1960).

[7] Va. Code Ann. §§22—232.18-232.31 (Supp. 1960).

viously designed to perpetuate what has always been a segregated school system.

It is clear that the pupil assignments are routinely made by the Pupil Placement Board. The Chairman of that Board says that now initial enrollments are on a voluntary basis and a Negro child may be enrolled in a white school upon request. But in the absence of a request, the long established procedure of enrollment of Negro children in Negro schools and white children in white schools persists. Then the "feeder" system begins to operate and the only means of escape is by following the prescribed administrative procedure of filing requests or applications for transfer. The difficulties to be encountered in pursuing this course are graphically demonstrated by the experiences of the infant plaintiffs in this litigation. They were able to escape from the "feeder" system only after the District Court made possible their release by ordering transfers.

A Negro child, having once been caught in the "feeder" system and desiring a desegregated education, must extricate himself, if he can, by meeting the transfer criteria. As this court said in Green v. School Board of City of Roanoke, Virginia, 304 F. 2d 118, 123 (4th Cir. 1962):

> "* * * These are hurdles to which a white child, living in the same area as the Negro and having the same scholastic aptitude, would not be subjected, for he would have been initially assigned to the school to which the Negro seeks admission."

It was pointed out in Jones v. School Board of City of Alexandria, Virginia, 278 F. 2d 72, 77 (4th Cir. 1960), that, by reason of the existing segregation pattern, it will be

Negro children, primarily, who seek transfers. The truth of this statement is evidenced by the fact that in Richmond only 127 Negro children out of a total of more than 23,000 are now attending previously all-white schools. This court further said in Jones, supra: "Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated * * *" 278 F. 2d 72, 76.

In recent months we have had occasion to consider the legality of other "feeder" systems found in operation in the public schools of Roanoke County, Virginia, and in the City of Roanoke, Virginia. See Marsh v. County School Board of Roanoke County, Va., 305 F. 2d 94 (4th Cir. 1962), and Green v. School Board of City of Roanoke, Virginia, 304 F. 2d 118 (4th Cir. 1962). In those cases, in opinions prepared by Chief Judge Sobeloff, the unconstitutional aspects of the systems there in operation were discussed in the light of the decisions of the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and in the light of numerous prior decisions of this and other courts. We find it unnecessary to again cite or review the pertinent decisions applicable to the maintenance of racially segregated school systems. In the Marsh and Green cases we reached the conclusion that injunctive relief, not only for the individual plaintiffs but for those who might find themselves confronted with the same problems, was justified.

A start has, indeed, been made to end *total* segregation of the races in the Richmond schools. The first step has been taken, one which, no doubt, was distasteful to those who are traditionally and unalterably opposed to an integrated

school system. But, upon this record and from the statements of the school officials, we find nothing to indicate a desire or intention to use the enrollment or assignment system as a vehicle to desegregate the schools or to effect a material departure from present practices, the discriminatory character of which required the District Court to order relief to the infant plaintiffs before it. In the present status in which the case was left by the District Court, the school authorities are yet free to ignore the rights of other applicants and thus to require the parents of new applicants to protest discriminatory denials of transfers, to require an infant applicant with his or her parents to attend a hearing on the protest which is not likely to be held earlier than August of 1963, and then to require the applicants to intervene in the pending litigation (possibly to be met with defensive tactics calculated to result in delay), the applicants fervently hoping to obtain relief from the court not long after the beginning of the 1963-64 school session if such relief is to be meaningful.

The School Board of the City of Richmond has abdicated in favor of the Pupil Placement Board leaving the latter with a school system which, in normal operation, has demonstrated its potential as an effective instrumentality for creating and maintaining racial segregation. Nearly nine years have elapsed since the decisions in the Brown v. Board of Education cases and since the Supreme Court held racial discrimination in the schools to be unconstitutional. The Richmond school authorities could not possibly have been unaware of the results of litigation involving the school systems of other cities in Virginia, notably Norfolk, Alexandria, Charlottesville and Roanoke. Despite the knowledge

which the authorities must have had as to what was happening in other nearby communities, the dual attendance areas and "feeder" system have undergone no material change.

Assignments on a racial basis are neither authorized nor contemplated by Virginia's Pupil Placement Act. We are told that initial assignments are now made on a purely voluntary basis but the Placement Board *assumes* that a Negro child prefers to attend a school with children of his own race and he is so assigned unless otherwise requested. Richmond's administration of her schools has been obviously compulsive and it is evident that there has been little, if any, freedom of choice.

> "Though a voluntary separation of the races in schools is uncondemned by any provision of the Constitution, its legality is dependent upon the volition of each of the pupils. If a reasonable attempt to exercise a pupil's individual volition is thwarted by official coercion or compulsion, the organization of the schools, to that extent, comes into plain conflict with the constitutional requirement. A voluntary system is no longer voluntary when it becomes compulsive." See Jeffers v. Whitley, 309 F. 2d 621, 627 (4th Cir. 1962).

Notwithstanding the fact that the Pupil Placement Board assigns pupils to the various Richmond schools without recommendation of the local officials, we do not believe that the City School Board can disavow all responsibility for the maintenance of the discriminatory system which has apparently undergone no basic change since its adoption. Assuredly it has the power to eliminate the dual attendance

areas and the "feeder" system which the District Court found to be primarily responsible for the discriminatory practices disclosed by the evidence. It would be foolish in the extreme to say that neither the City School Board nor the Pupil Placement Board has the duty to recognize and protect the constitutional rights of pupils in the Richmond schools. That there must be a responsibility devolving upon some agency for proper administration is unquestioned. We are of the opinion that it is primarily the duty of the School Board to eliminate the offending system.[8]

In these circumstances, not only are the individual infant plaintiffs entitled to relief which has been ordered but the plaintiffs are entitled, on behalf of others of the class they represent and who are similarly situated, to an injunction against the continuation of the discriminatory system and practices which have been found to exist. As we clearly stated in Jeffers v. Whitley, 309 F. 2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect *a general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race*. The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and "feeder" system, if initial assignments are to be on a non-

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[8] *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Brown* v. *Board of Education*, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955); *Cooper* v. *Aaron*, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958).

discriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed.

If, upon remand, the defendants desire to submit to the District Court a more definite plan, providing for immediate steps looking to the termination of the discriminatory system and practices "with all deliberate speed," they should not only be permitted but encouraged to do so.

The District Court should retain jurisdiction of this case for further proceedings and the entry of such further orders as are not inconsistent with this opinion.

Reversed in part and remanded.

ALBERT V. BRYAN, Circuit Judge (dissenting in part).

I see no need for the prospective injunction. With fairness and clarity the opinion of the Court comprehensively discusses and approves the course the District Court prescribed for the defendants to follow in the future. With no reason to believe his directions will not be respected, the District Judge refused the injunction. In this he exercised the discretion generally accorded the trial judge in such situations, especially when the necessity for an injunction must be measured by local conditions. Of these we have no knowledge more intimate than his. I would not add the injunction.

Memorandum of the Court

[Filed March 16, 1964]

The Court of Appeals for the Fourth Circuit, when remanding this case for the entry of an injunction, said in *Bradley* v. *School Board of the City of Richmond, Virginia*, 317 F. 2d 429, 438 (4th Cir. 1963):

> "If, upon remand, the defendants desire to submit to the District Court a more definite plan, providing for immediate steps looking to the termination of the discriminatory system and practices 'with all deliberate speed,' they should not only be permitted but encouraged to do so."

Pursuant to the foregoing paragraph in the opinion of the Court of Appeals, the School Board submitted a plan in the form of a resolution providing as follows:

> "(a) Recommendations for assignment of pupils seeking enrollment in the public school system for the first time or initial enrollment in the junior or senior high schools shall be made upon consideration of the distance the pupils live from such schools; the capacity of such school; availability of space in other schools; whether the program of the pupil can be met by such school; the school preference as shown on the pupil placement application form; and what is deemed to be in the best interest of such pupil.
>
> "(b) The school administration shall recommend that pupils be assigned to the schools which they at-

tended the preceding year, except those eligible for promotion to another school. However, application may be made by the parent, guardian or other person having custody of such pupils for their placement in another school named in the application in which case the reason for the requested transfer should be stated. The school administration may recommend to the Pupil Placement Board that such application be approved if it be deemed to be in the best interest of the pupil.

"(c) Applications for transfers to a particular school must be made and received by the school administration before June 1 preceding the school year to which the placement requested is to be applicable."

The plaintiffs filed exceptions to the plan and the Court conducted a hearing on its sufficiency. The exceptions are:

"1. The plan fails to satisfy the requirement of the opinion of the United States Court of Appeals for the Fourth Circuit that the Richmond City School Board

"(a) eliminate the dual system of attendance areas in the initial assignment of pupils to schools.

"(b) end the feeder system of assigning pupils to schools, and

"(c) refrain from conditioning the grant of a requested transfer on burdensome or discriminatory criteria.

"2. Paragraph 1(a) of the plan (which provides for initial enrollment in the school system or in junior or senior high schools) is vague and indefinite and is inadequate to protect the constitutional rights of the Negro pupils to racially non-discriminatory school assignments.

"(a) This provision confers on the school administration unlimited discretion to assign pupils, including racially determined assignments. It fails to provide standards to govern the exercise of the superintendent's discretion in making assignments, thus conferring an absolute discretion which renders the caveat against racial discrimination meaningless, and thus does not adequately protect against the use of racial considerations in placing pupils in schools.

"(b) This provision purports to indicate a general basis for determining school attendance areas. The formulation of standards for determining attendance areas is, of course, within the control of the defendants so long as race is not used in determining zones, selecting school sites, etc.; however, the general statement made in the plan, without any indication of specific school zones to be used either next year or in any subsequent years, affords the Court no basis upon which to appraise the practical impact of an order approving the plan or any part of it. It is not possible to determine whether or not the

plan would in fact accomplish any desegregation of the school system.

"3. Paragraph 1 (b) of the plan (which provides for the transfer of pupils) is calculated to frustrate rather than protect the rights of Negro pupils to racially nondiscriminatory school assignments.

"(a) This provision requires the assignment of pupils in accordance with the dual zones which have been condemned by the Court of Appeals and by this Court in this case and in many other cases.

"(b) It then provides that in order to escape this assignment, the pupil must induce his parents to follow the state's Pupil Placement Board procedure which, in a form more favorable to the rights of the Negro child, was condemned by the Court of Appeals and by this Court in this case. Now, instead of refraining from making a recommendation, the school administration is given permission to make a favorable recommendation, '. . . if it be deemed to be in the best interest of the pupil.'

"4. Plaintiffs object to the plan in that it omits any provision for the assignment or reassignment of teachers and staff of the schools on a nonracial basis. In this connection, plaintiffs assert their personal rights to attend a school system in which there is no racial segregation or discrimination.

"5. Plaintiffs object to the plan in that it fails to provide any arrangement for the desegregation of

special education programs now conducted or which may be conducted in the future, including such things as special classes for the handicapped or gifted pupils, kindergarten, or other pre-school programs, adult education programs, summer school programs, etc. In this connection, the plan fails to provide for the desegregation of the special project for the improvement of culturally deprived children being financed by the Ford Foundation and being conducted in several of the city's schools on a segregated basis.

"6. Plaintiffs further object that the plan makes no provision for pupils seeking or needing education in specialized courses."

For the purpose of evaluating the resolution the Court has considered its interpretation by the School Board and administrative authorities. From the resolution and the evidence pertaining to its interpretation and administration the Court finds that the plan by which pupils are assigned to schools provides:

1. Each child entering first grade may attend any school of his choice. The choice of the pupil must be indicated. He is not assigned to any school until he makes application to a specific school.

2. Each pupil is assigned to the school where he is presently enrolled until he completes the grades offered in that school; but a pupil has the unqualified right to transfer

for the next school year to any other school which has the capacity to receive him. At the present time no school is designated as filled to capacity and therefore this factor is not a restriction upon transfers.

3. The parents of each pupil who completes the last grade in an elementary or junior high school must indicate the school the pupil wishes to attend. Each pupil has an unqualified right to attend any school of his choice subject to capacity which presently is not a restrictive factor.

4. Attendance areas have been abolished.

5. The "feeder system" of schools has been abolished.

6. All requests for transfer for the following school year must be submitted before June 1.

7. Forms and instructions are provided at each school to enable pupils to transfer. Principals are required to give pupils information about their rights to school assignments.

8. The actual assignment is made by the pupil placement board upon recommendation of the School Board.

9. The plan encompasses all public schools in the City.

The foregoing constitute the essential elements of the plan as it is now being administered. The Court also finds:

10. The plan went into effect in September 1963. No student who applied for transfer before May 31 was denied

admission to a school of his choice. Two students who sought transfers after May 31 were denied. (The Court directed their admission under the injunction previously entered.)

11. Certain criteria mentioned in the resolution have not yet been applied to deny any pupil admission to a school. These pertain to the "distance the pupils live from such schools * * * whether the program of the pupil can be met by such school * * * and what is deemed to be in the best interest of such pupil."

12. The plan makes no reference to the employment of Negro and white faculty and staff.

Conclusions of Law

The plan, as presently administered, generally conforms with the description of a voluntary system found in *Jeffers* v. *Whitley,* 309 F. 2d 621, 624 (4th Cir. 1962). It is approved subject to the following qualifications. The resolution is framed in such broad language that its validity depends upon the interpretation placed upon it by the School Board and the manner in which it is administered. Presently this is valid. The School Board must not, however, vary the plan's interpretation or administration without securing the Court's approval of amendments setting forth any changes they propose.

The plan has been described by the defendants as a "freedom of choice plan." To condition "freedom of choice" upon the School Board's determination of the "best interest

of such pupil" is anomalous. Moreover, the "best interest" criterion is unduly vague. No students have yet been denied admission to a school because of this provision. Consequently neither interpretation nor administration furnishes a guide for determining its validity. The School Board, therefore, must not deny admission or transfer of a pupil because of the "best interest" provision until they secure approval of an amendment to the plan making more definite this requirement.

No pupil has been denied admission to any school by reason of the residential or "program" criteria mentioned in the resolution. Reasonable, non-discriminatory scholastic and residential requirements are not invalid. See *Green* v. *School Board of the City of Roanoke, Virginia,* 304 F. 2d 118, 123 (4th Cir. 1962).

Transfers conditioned on "whether the program of the pupil can be met" by the school to which the pupil seeks admission should present little difficulty if approval of the transfer is based solely upon whether the courses the pupil seeks are taught in the school. Experience has shown, however, that evaluation of a pupil's "program" through academic achievement tests presents serious obstacles. *Green* v. *School Board of the City of Roanoke, Virginia,* 304 F. 2d 118 (4th Cir. 1962).

At present no school is filled to capacity. If this situation should change, care must be exercised to avoid discrimination in formulating definite residential requirements, cf. *Marsh* v. *County School Board of Roanoke County, Virginia,* 305 F. 2d 94 (4th Cir. 1962).

Jackson v. *School Board of City of Lynchburg,* 321 F. 2d 230, 233 (4th Cir. 1963) pointed out that assignment of faculty was a suitable element for inclusion in a school board's plan. See also *Board of Public Instruction of Duval County, Florida* v. *Braxton,* 326 F. 2d 616 (5th Cir. 1964). It does not appear, however, that the absence of such provisions requires the rejection of a plan for the assignment of pupils.

The requirement that applications for transfer be submitted prior to June 1 is reasonable when applied in a nondiscriminatory manner. Planning for the next school year necessitates knowledge of the conditions that will exist. The date conforms with the regulation of the State Pupil Placement Board under which many transfers of Negro pupils were made last year. This Court previously has conditioned assignment upon compliance with this administrative requirement, e.g. *McLeod* v. *County School Board of Chesterfield County,* No. 3431, E. D. Va., Nov. 15, 1962. It has not, however, been included as a prerequisite to assignments in injunctions granted since the Court of Appeals directed this Court to encourage the submission of plans by local school boards. *Bradley* v. *School Board of the City of Richmond, Virginia,* 317 F. 2d 429, 438 (4th Cir. 1963).

The information about the plan appears to have been well disseminated last year. The method employed, as shown by the evidence was not insufficient. Here again, however, much depends on the administration of the plan. If further experience indicates that more notification of the

rights of pupils should be given, the Court will receive the suggestions of the parties. *Jeffers* v. *Whitley*, 309 F. 2d 621, 629 (4th Cir. 1962).

With approval of the School Board's plan, the injunction entered June 6, 1963 will be dissolved. The case, however, will be retained on the docket with leave of any party to seek further relief.

The temporary restraining order admitting William Pernell Andrews and Martha Melvina Boston to George Wythe High School will be made permanent. They qualified for admission under the terms of the general injunction entered June 6, 1963.

The plaintiffs have moved for the allowance of counsel fees. Since the submission of a plan was not a mandate placed upon the School Board, the Court deems inappropriate the allowance of counsel fees with respect to the hearings on the plan.

Counsel for the plaintiffs did, however, appear on behalf of two students who were improperly denied admission to George Wythe High School. Counsel fees in the amount of $75.00 will be allowed the plaintiffs' attorneys for this phase of the case. *Bell* v. *School Board of Powhatan County, Virginia*, 321 F. 2d 494, 500 (4th Cir. 1963); *Scott* v. *School Board of the City of Fredericksburg*, No. 3438, E. D. Va., Sept. 19, 1963.

JOHN D. BUTZNER, JR.
United States District Judge

Order

[Entered March 16, 1964]

For reasons stated in the Memorandum of the Court this day filed, it is ADJUDGED and ORDERED:

1. The plan of the School Board of the City of Richmond is approved to the extent mentioned in the Memorandum of the Court.

2. The injunction entered June 6, 1963 is dissolved.

3. The defendants, and each of them, their successors in office, agents and employees are enjoined from denying admission to William Pernell Andrews and Martha Melvina Boston to George Wythe High School.

4. The motion for allowance of counsel fees with respect to hearings on the School Board's plan is denied.

5. Counsel for the plaintiffs are jointly allowed counsel fees in the amount of $75 against the School Board of the City of Richmond and the Division Superintendent of Schools for their appearance in behalf of pupils denied admission to George Wythe High School in September 1963.

Let the Clerk send copies of this order and the Memorandum of the Court to counsel of record.

JOHN D. BUTZNER, JR.
United States District Judge

Opinion of April 7, 1965

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9471

CAROLYN BRADLEY and MICHAEL BRADLEY, infants, by MINERVA BRADLEY, their mother and next friend, *et al.*,

Appellants,

versus

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, H. I. WILLETT, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. OGLESBY, ALFRED L. WINGO and E. T. JUSTIS, individually and constituting the Pupil Placement Board of the Commonwealth of Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
John D. Butzner, Jr., District Judge.

(Argued October 5, 1964. Decided April 7, 1965.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN, and J. SPENCER BELL, Circuit Judges, sitting en banc.

Henry L. Marsh, III, and S. W. Tucker for Appellants, and Henry T. Wickham, Special Counsel, City of Richmond (J. Elliott Drinard, City Attorney of Richmond, and Tucker, Mays, Moore & Reed on brief), for Appellees The School Board of the City of Richmond, Virginia, and H. I. Willett, Division Superintendent of Schools of Richmond, Virginia.

HAYNSWORTH, *Circuit Judge*:

This is the second time the second of two Richmond school cases has been before us. This time the principal question is whether the School Board adequately discharges its duty under the law when it gives to every pupil an unrestricted right to attend the school of his choice, or that of his parents. The District Court held that it does, and we agree. There are other subsidiary questions.

I

This case was begun by eleven Negro pupils and their parents or guardians. The eleven pupils had been denied admission to schools attended entirely, or predominantly, by white pupils. Before trial, one was admitted to the school of his choice, and the Court ordered the admission of the remaining ten. In doing so, the Court found that, in general, assignments were being made on the basis of dual attendance zones, that promotions from primary to junior high schools and from junior high schools to senior high schools were controlled by a feeder system, and that trans-

fer requests by Negroes attending Negro schools were denied on the basis of criteria which were not employed in processing the applications of white pupils living in the same residence area and wishing to attend the same school to which the Negro pupils sought to be transferred. These discriminatory practices, of course, were condemned, and it was because they had been employed that the District Judge ordered the admission of the remaining ten plaintiffs.

While the District Judge thus clearly pointed up the faults in the practices which had governed school assignments for the 1961-1962 school year, the requested general injunctive order was denied. Denial of injunctive relief beyond the requirement of enrollment of the individual plaintiffs in the schools of their choice was predicated upon the Court's finding that the School Board had taken affirmative steps to eliminate discriminatory practices in handling enrollments in the first grade of all primary schools and in those of one of the high schools.

On the first appeal the question in this Court was whether the District Court should have granted general injunctive relief in addition to requiring the admission of the individual plaintiffs. We concluded[1] that he should have issued the requested injunction because of the evident fact that discriminatory practices had been followed in handling admissions and transfer applications. One member of this Court dissented upon the ground that he thought an in-

[1] Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 317 F. 2d 429.

junction unnecessary since the District Court had clearly pointed out to the Board what was necessary to be done, and there was no reason to suppose that the Board would not do it. The case was to be retained upon the docket, which was adequate, in the opinion of the dissenter, to assure that if further relief became requisite, it could be had readily.

The first appeal in this case was brought to this Court by the plaintiffs, not by the School Board, and in this Court the Board did not take issue with the conclusions of the District Court about the deficiencies in its earlier handling of admissions and transfer applications. It suggested a willingness to comply with the requirements outlined in the District Judge's memorandum opinion, contending only that it should have a reasonable opportunity to do so without the need of a formal injunctive order.

It was thus not surprising that while the first appeal was still in the bosom of this Court, the Richmond School Board adopted resolutions designed to eliminate the objectionable features in the practices theretofore followed by it and the Virginia Pupil Placement Board.

These resolutions, adopted in March, 1963, as subsequently construed and limited by the District Court, provide that every pupil initially entering the Richmond School system, or his parent for him, is required to state his choice as to the school he wishes to attend. He is assigned to the school of his choice. Every pupil promoted from any elementary school in Richmond, or his parent for him, is required to make a similar choice, and he is assigned to the school of his choice, as are those promoted from junior high

school to senior high school. Every other pupil is assigned to the school he previously attended, but he may apply for a transfer to any other school, and, since transfer requests are routinely granted without hearings or consideration of any limiting criteria;[2] he is assigned to the school of his choice. When this case was orally argued in this Court on October 5, 1964, we were assured that no timely transfer application had been denied since adoption of the resolutions of March, 1963.

Since pupils have been assigned in the Richmond schools pursuant to the 1963 scheme for the 1963-4 and 1964-5 school years, it appears that every pupil in the first two grades of primary school, junior high school and senior high school are attending the school affirmatively selected by him or his parents as the one he and they wished him to attend. Every other pupil in the school system has and has had an unrestricted right of transfer, which the District Court found had been adequately publicized and made known to pupils and parents.

Under the School Board's resolutions, as construed by the District Court, all attendance areas have been abandoned; there is no longer a feeder system for handling promotions from one level to another, and transfer requests are allowed without discriminatory conditions.

There are some limiting factors. Transfer applications by one previously assigned to a school must be submitted

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[2] The resolution provides that school capacity may be a limiting factor. As a practical matter it has not been thus far. That matter is discussed, infra.

before June 1 to be granted effectively as of the opening of the next school year. This requirement the District Court found reasonable in light of the planning needs of the Board. There is also a provision that a transfer application by a pupil previously assigned to a school may be denied, if the school to which entry is sought does not have the capacity to receive him. The plan does not spell out what would happen in the event of a denial of an application upon the ground of want of capacity, but the District Judge thought that the reservation was not of practical importance because, so far, there has been no want of capacity to allow all transfer applications, and no transfer request has been denied on that ground, or, indeed, for any other reason except lack of timeliness.[3]

Upon remand of the case after the first appeal, the District Court entered an appropriate general injunction in conformity with the opinion of this Court. Thereafter the School Board filed with the Court the resolutions it had adopted in March 1963, and counsel for the plaintiffs filed objections to them as a plan for the subsequent operation of the schools.

The original plaintiffs having all been admitted to schools of their choice, two other pupils and their parents entered the case. They had applied on September 6, 1963 for admission to a high school attended predominantly by white pupils, and their applications had been denied as being too late. The District Judge promptly ordered their admission, since he had not approved the plan and its requirement that

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[3] Two transfer applications made on September 6, 1963 were denied as tardy. They are mentioned below.

transfer applications be filed before June 1 to be granted effectively for the ensuing school year. Thereafter, there was a further hearing as to the reasonableness and propriety of the resolutions adopted by the School Board, after which the Court filed a memorandum opinion on March 16, 1964 approving the Board's plan as construed and limited by the Court.[4]

In the posture in which the case comes to us, therefore, it appears that the School Board's resolutions, as construed by the District Court, provide for a freedom of choice by every individual in the Richmond school system as to the school he attends. There also is a requirement that the choice be affirmatively exercised by every pupil entering the system for the first time and by every other pupil as he moves from one level to another.

In finding that the plan, as operated, does provide for unrestricted freedom of choice, the District Judge largely disregarded the potential limitation of the school capacity

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[4] The School Board's resolutions, for instance, provide for denial of transfer applications when denial "is in the best interest of the pupil." Such a provision, of course, could provide a means of discrimination, and the District Court ordered that it not be applied in any case unless its purpose and effect were made definite and certain by an amendment, and the amendment had been approved by the Court. The School Board's resolutions also contain a limiting qualification that the chosen school must be equipped to meet the pupil's "program." This qualification the District Court approved with the admonition that it should be employed only when the courses the pupil seeks are not taught in the school he seeks to enter. Obviously, there is no discrimination involved if primary grade pupils are not allowed to enter high schools or when pupils are required to remain within other program subdivisions based upon objective criteria unrelated to race and applied without discrimination.

provision. For the present, we think he was justified in doing so. It had not been invoked at the time of the hearing for the purpose of denying any transfer application, and we are assured that it has not since then been invoked. Until some occasion arises for its invocation, it is irrelevant. Thereafter, what the School Board does may affect the validity of its operation,[5] but we are entitled to assume that the unrestricted freedom of choice which has been available to all pupils and parents in the school system for the past two school years will continue to be available, or that the School Board will make other adjustments which are approvable by the Courts.[6] The mere fact, however, of a possibility that capacity problems may affect the operation of the plan in future years has no immediate bearing upon the validity of what the School Board has done for the years now under consideration when the capacity limitation was inoperative.

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[5] There was testimony by one of the school officials that the intention was to proceed as do the Baltimore schools when a particular school reaches capacity; indeed, that the intention was to apply all of the Baltimore plan just as it is operated in Baltimore. Obviously, if the capacity limitation is so applied as to result in the denial of transfer applications of Negro pupils attending schools in which there are few or no white pupils upon the ground that all schools attended substantially by white pupils are over-capacity, there would be no "freedom of choice," as that term has been employed in this context. Such freedom exists in a practical sense only when a pupil wishing to attend a school with substantial numbers of the other race has an unequivocal and realizable right to do so. If his first choice be unavailable, some other reasonable alternative must be available to him.

[6] The District Court limited its approval of the plan prospectively, so that if and when the Board resorts to the capacity limitation, its use of it must be approvable.

The Negro plaintiffs do not question the present existence of an unrestricted freedom of choice in selection of schools. Their position on appeal is that freedom of choice is not an appropriate means for elimination of segregation. Extracting a phrase from the second Brown decision,[7] in which there was reference to "states requiring or permitting such discrimination," the plaintiffs insist that there are a sufficient number of Negro parents who wish their children to attend schools populated entirely, or predominantly, by Negroes to result in the continuance of some schools attended only by Negroes. To that extent, they say that, under any freedom of choice system, the state "permits" segregation if it does not deprive Negro parents of a right of choice.

It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous.

The phrase from the second Brown decision as to which the plaintiffs refer lends no support to their contention. The first paragraph of the opinion, in which the phrase

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[7] Brown v. Board of Education, 349 U. S. 294, 298.

appears, clearly and precisely expresses the proscription against "discrimination." There is no hint of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the entent that each individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.

This and other courts have repeatedly referred to the legality and propriety of a system of free transfers.

We first did so in Dillard v. School Board of City of Charlottesville, 4 Cir., 308 F. 2d 920, 923-4. In an opinion previously prepared by Senior Judge Soper, subsequently adopted per curiam as the opinion of the en banc court, there was approving reference to systems of unrestricted rights of transfer, which were said to have been conspicuously successful in Baltimore and in Louisville. Subsequently, in Jeffers v. Whitley, 4 Cir., 309 F. 2d 621, while condemning a compulsive system sought to be justified on the basis of assertions of volition of the pupils, we indicated en banc our approval of a truly voluntary system under which at reasonable intervals reasonable alternatives were available to all pupils, so that those who wished to do so might attend a school with members of the other race. Finally, when this case was before us earlier, this Court, anticipating the School Board's implementation of a system of free assignments and transfers, indicated its appropri-

ateness, provided pupils, parents and the public in general were all informed of it. We there said in summary:[8]

> "• • • As we clearly stated in Jeffers v. Whitley, 309 F. 2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect a *general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race.* The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and 'feeder' system, if initial assignments are to be on a nondiscriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed." (Emphasis in original.)

Though the School Board's resolutions of 1963 were adopted before our previous opinion was announced, they were clearly in anticipation of it. As subsequently put into practice with the limitations and interpretations imposed upon them by the District Court, the School Board has fol-

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[8] Bradley v. School Board of City of Richmond, 4 Cir., 317 F. 2d 429, 438.

lowed precisely the suggestions of this Court made in this very case.

The underlying principle was originally announced by three-judge courts upon remand of two of the original school cases decided in Brown.[9] It has received recent affirmation in decisions in the Second, Fifth and Seventh Circuits, as well as in this one.

In the New Rochelle, New York, cases, after Judge Kaufman found that the all-Negro Lincoln School was in a gerrymandered zone deliberately drawn by the School Board for the purpose of segregating the school population,[10] the question arose as to the appropriate remedy. The School Board submitted a plan of limited transfers, which the District Court modified so as to make it a plan of substantially unrestricted tranfers. The modified plan was approved by the District Court.[11] Under this plan, each pupil in the Lincoln school was to be given the right to transfer to some other school in New Rochelle. Each transfer applicant was to be requested to list four other elementary schools in the order of his preference, and such applications would be granted subject to the capacity of the school, or schools, to which entry was sought. Transfer applications had to be submitted before June 1st to be con-

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[9] Briggs v. Elliott, E. D. S. C., 132 F. Supp. 776; Brown v. Board of Education, D. C. Kan., 139 F. Supp. 468.

[10] Taylor v. Board of Education of City School District of City of New Rochelle, D. C. S. D. N. Y., 191 F. Supp. 181.

[11] Taylor v. Board of Education of City School District of City of New Rochelle, D. C. S. D. N. Y., 195 F. Supp. 231.

sidered for the ensuing school year, and the parents of the transfer applicants were advised that they, themselves, would have to furnish whatever transportation was required.

The Court of Appeals for the Second Circuit affirmed the plan embodied in Judge Kaufman's decree.[12] It construed that plan as comparable to the Baltimore plan and said of it, "We think this plan an eminently fair means of grappling with the situation in accord with the principles stated in the Brown case."

Judge Moore dissented in Taylor. His primary disagreement was with the original finding that the Lincoln zone was gerrymandered, and that the School Board purposely imposed the racial character of the school. He also thought the permissive transfer plan, approved as an appropriate solution, was unfair because other pupils in the New Rochelle school district had no comparable rights. His dissent, however, suggests no disagreement with the principle that if all the pupils in a school district are given a substantially unfettered freedom of choice as to the schools they attend, the School Board fully complies with the requirements of the Brown case and its successors.

In Bell v. School City of Gary, Indiana, 7 Cir., 324 F. 2d 209, the Court, in approving assignments based upon geographic zoning, emphasized the Constitution's proscription against discrimination and the absence of any prohibition

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[12] Taylor v. Board of Education of the City School District of New Rochelle, 2 Cir., 294 F. 2d 36.

of segregation, itself. The inflexible geographic zoning system was approved, notwithstanding the fact that its product was de facto segregation in the schools.[13]

In Calhoun v. Latimer, 5 Cir., 321 F. 2d 302, Atlanta's inverted stair-step plan of desegregation was approved, notwithstanding it would not be accomplished until well within the 1970's, and notwithstanding that the only means provided for desegregation of the "desegregated" grades was permissive transfer, which, under the plan approved by the District Court, was allowable only if the applicant met certain criteria. His achievement, for instance, had to be at least as high as the average in the school to which he sought to be transferred. Judge Rives dissented, both because the transfer provision was restricted and because twelve years for the accomplishment of desegregation in all grades was too long. In denying a petition for rehearing, the majority made it clear that, in subsequent operation, transfer applications should be processed on a nondiscriminatory basis, and specifically required that the scholastic requirement be abandoned except to the extent it was required of white applicants.

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[13] See also Downs v. Kansas City Board of Education, 10 Cir., —— F. 2d —— (33 Law Week 2168); Lynch v. Kenston School District Board of Education, N. D. Ohio, 229 F. Supp. 740; Webb v. Board of Education of City of Chicago, N. D. Ill., 223 F. Supp. 466; Evans v. Buchanan, D. Del., 207 F. Supp. 820; Henry v. Godsell, E. D. Mich., 165 F. Supp. 87; Brown v. Board of Education, D. Kan., 139 F. Supp. 468, 470. Cf. Blocker v. Board of Education of Manhasset, New York, E. D. N. Y., 226 F. Supp. 208, and Branche v. Board of Education of Town of Hempstead, School District No. 1, E. D. N. Y., 204 F. Supp. 150.

The judgment in Calhoun v. Latimer was vacated by the Supreme Court.[14] The opinion of the Supreme Court recites that the Atlanta School Board had adopted "additional provisions offering free transfers with certain limitations" in the "desegregated" grades of the high schools. The Court thought that the new resolutions should be first appraised by the District Court after an evidentiary hearing, and, for that purpose, the case was remanded, with the admonition, based upon other recent cases, that the discretion for approval of a prolonged transition period is not so great now as it once was.

We, of course, would not have approved the transfer provisions considered by the Fifth Circuit in Calhoun v. Latimer.[15] The interesting thing, however, is that the Court approved a plan for the allowance of transfers as an appropriate device to bring the school system into compliance with the legal requirements. Even the Atlanta Board's most recent resolutions, adopted on April 8, 1964, were said by the Supreme Court to have contained factors to be considered by the Board in making initial assignments and in allowing transfers. If a remand was appropriate there, there is certainly no suggestion that provision for an unrestricted freedom of choice in initial assignments to each school level and in procuring transfers is not a permissible

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[14] 377 U. S. 263.

[15] Green v. School Board of City of Roanoke, Virginia, 4 Cir., 304 F. 2d 118; Dodson v. School Board of City of Charlottesville, Virginia, 4 Cir., 289 F. 2d 439; Jones v. School Board of City of Alexandria, Virginia, 4 Cir., 278 F. 2d 72.

and appropriate means of finally terminating all enforced segregation and bringing the school system into full compliance with the law.

That it is, was also indicated by the Supreme Court in its opinion in Goss v. Board of Education of Knoxville, 373 U. S. 683, 687. In disapproving a provision for minority transfers, it specifically noted that it would have an entirely different case if the plan provided for transfers regardless of the race of the applicant and the racial composition of the school to which he was assigned. Such a plan, the Supreme Court said, would permit freedom of choice "entirely free of any imposed racial considerations."

In addition to the cases previously considered, this Court has indicated that a system of free transfers superimposed upon a plan of geographic zoning is unobjectionable and permissible.[16] The plaintiffs suggest agreement that such an arrangement would be unobjectionable, but they urge that an approvable geographic scheme of original assignments must underlie a plan giving all pupils freedom of choice. We find, however, that an underlying geographic plan is not a prerequisite to the validity of a freedom of choice plan. A system of free transfers is an acceptable device for achieving a legal desegregation of schools.[17] Its accept-

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[16] Dodson v. School Board of City of Charlottesville, Virginia, 4 Cir., 289 F. 2d 439.

[17] Calhoun v. Latimer, 5 Cir., 321 F. 2d 302, *vacated and remanded* for another reason, 377 U. S. 263; Taylor v. Board of Education of City School District of City of New Rochelle, 2 Cir., 294 F. 2d 36; Dodson v. School Board of City of Charlottesville, Virginia, 4 Cir., 289 F. 2d 439 (plan found discriminatorily applied); Dillard v. School Board of City of Charlottesville, Virginia, 4 Cir., 308 F. 2d 920, 923-4.

ability is not dependent upon the concurrent use of some other device which also might be adequate. In this circuit, we do require the elimination of discrimination from initial assignments as a condition of approval of a free transfer plan.[18] Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis.

The Richmond School Board was clearly told by the opinion of the District Judge after the first hearing that it must abolish its former system of dual zones. In the opinion of this Court in the first appeal, we affirmed and restated the obvious illegality of dual zoning.

The School Board might have complied with the directions of the District Court, affirmed here, by redrawing all zone boundaries so as to provide a single zone for each school without overlapping, but that would have been a major task and open to challenge everywhere as to whether zone lines were reasonably and fairly drawn without regard to race. The other means of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils.

It is suggested in this Court that fault should be attributed to the Board because "it has done nothing" since

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[18] Buckner v. County School Board of Greene County, Virginia, 4 Cir., 332 F. 2d 452.

our mandate went down following the first appeal. The suggestion is a perversion of the facts. The Board's resolutions of March 1963 were adopted, of course, before our mandate went down. They preceded the entry of the judgment, but, as subsequently construed and amended by the District Judge, they effectively abolished the dual zoning system, the feeder system and the requirement that transfer applications be considered in the light of discriminatory criteria. The resolutions effectively removed all of the objectionable features which the District Court had found in the procedures which had been followed earlier. That a defendant acquiesces in the adverse findings of the District Court and brings itself into compliance with the District Court's opinion before its affirmance on an appeal in which they are uncontested by the defendant is reason for some commendation and not for censure.

Of course, it is literally untrue that the Board has done nothing since the mandate of this Court in the first appeal went down. It has accepted the District Court's limitations upon and restriction of its March 1963 resolutions, and has actually operated under them as so construed and limited. Subsequent operation entirely free of any taint of the discriminatory practices which this Court condemned is substantial activity following in point of time the earlier judgment of this Court. If the Board's subsequent conduct fully complies with the earlier opinion of this Court, the Board is subject to no criticism whatever for having taken initial steps to bring itself in compliance with this Court's mandate before this Court formally acted.

II

The plaintiffs also complain that the District Court did not enjoin consideration of race in the assignment of teachers and administrative staff.

It has been held that when there is enforced segregation of pupils, an order requiring the desegregation of teachers and staff does not go "beyond the permissible range of the trial court's choice of means to put an end to an operation of schools on a racially segregated basis." [19] In such a case, the District Court may prefer other means, and when he employs more direct methods, exclusively, there generally will be involved no abuse of discretion.[20] In the usual case, so long as the ultimate objective is adequately served, the choice of means is finally, as well as initially, for the District Court.

In a particular factual setting, it may be contended that consideration of race in the assignment of teachers and staff coerces the pupils and effects a discrimination against them. The pupils have standing to raise such a question to the extent it involves an asserted denial of constitutionally protected rights of the pupils.[21] An appropriate allegation

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[19] Board of Public Instruction of Duval County Florida v. Braxton, 5 Cir., 326 F. 2d 616, 620.

[20] See Calhoun v. Latimer, 5 Cir., 321 F. 2d 302, vacated on other grounds, 377 U. S. 263.

[21] Griffin v. County School Board of Prince Edward County, Virginia, 4 Cir., —— F. 2d —— (decided Dec. 2, 1964); Northcross v. Board of Education of City of Memphis, Tenn., 6 Cir., 333 F. 2d 661; Jackson v. School Board of City of Lynchburg, Virginia, 4 Cir., 321 F. 2d 230; Mapp v. Board of Education of City

tendering such a question may not be stricken, for, whether in a particular case it may be regarded as a question of law or of fact, a resolution of so important a matter should await a full hearing on the merits.[22]

The question of assignment of teachers was ignored in the hearings below. The plaintiffs have made no effort to develop a record upon which a finding of actual discrimination against pupils could be predicated. There has been no inquiry as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils, nor has there been any inquiry as to the impact of such an order as the plaintiffs seek upon the administration of the schools and upon the teachers and the administrative personnel. The undeveloped record furnishes no basis for judgment apart from a conviction, in agreement with the Fifth Circuit,[23] that decision cannot precede a full and complete inquiry in the District Court into the merits.

When there has been no inquiry into the matter, it cannot be said that the plaintiffs have discharged the burden they must shoulder of showing that such assignments effect a denial of their constitutional rights.

Whether and when such an inquiry is to be had are matters with respect to which the District Court also has a

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of Chattanooga, Tenn., 6 Cir., 319 F. 2d 571; Augustus v. Board of Public Instruction of Escambia County, Florida, 5 Cir., 306 F. 2d 862; Christmas v. Board of Education of Harford County, Maryland, D. C. D. Md. 231 F. Supp. 331.

[22] Augustus v. Board of Public Instruction of Escambia County, Florida, 5 Cir., 306 F. 2d 862.

[23] Augustus v. Board of Public Instruction of Escambia County, Florida, 5 Cir., 306 F. 2d 862.

large measure of discretion. The Fifth[24] and Sixth[25] Circuits have so held, and we agree. When direct measures are employed to eliminate all direct discrimination in the assignment of pupils, a District Court may defer inquiry as to the appropriateness of supplemental measures until the effect and the sufficiency of the direct ones may be determined. The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools. An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils.

III

Finally, the attorneys for the appellants ask an award of attorneys' fees. They asked for such fees in the District Court and were awarded a nominal fee because of their representation of the two additional plaintiffs whose entry into the school of their choice was ordered by the District

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[24] Augustus v. Board of Public Instruction of Escambia County, Florida, *supra*, note 23.

[25] Mapp v. Board of Education of City of Memphis, Tenn., 6 Cir., 319 F. 2d 571.

Judge, despite the fact that their applications were belated. While the District Court's order was otherwise generally unfavorable to the plaintiffs, and we affirm it here, the plaintiffs' attorneys say that as a result of their efforts in the first trial the plaintiffs obtained very substantial relief. It is true that the original plaintiffs did obtain substantial relief in the District Court in the first trial, and it is true also that we directed an award of attorneys' fees in Bell v. School Board of Powhatan County, Virginia, 4 Cir., 321 F. 2d 494.

It is only in the extraordinary case that such an award of attorneys' fees is requisite. In school cases throughout the country, plaintiffs have been obtaining very substantial relief, but the only case in which an appellate court has directed an award of attorneys' fees is the Bell case in this Circuit. Such an award is not commanded by the fact that substantial relief is obtained. Attorneys' fees are appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy. Whether or not the board's prior conduct was so unreasonable in that sense was initially for the District Judge to determine. Undoubtedly he has large discretion in that area, which an appellate court ought to overturn only in the face of compelling circumstances.

We can find no abuse of the District Court's discretion in refusing to allow attorneys' fees in a larger amount than it did.

We thus find no error in the District Court's order.

Affirmed.

Concurring and Dissenting Opinions of April 7, 1965

ALBERT V. BRYAN, Circuit Judge, concurring:

Just what more is the entitlement of the Negro pupils beyond what the Richmond School Board has done to eliminate racial discrimination in pupil attendance is not clear to me. I expressly note my concurrence in the present opinion, which is every way satisfactory, only to accent the view that the Board's concern, consideration and action have been exemplary. Besides, this attitude demonstrates the needlessness of the injunction we imposed in the prior Richmond appeal.

SOBELOFF and J. SPENCER BELL, Circuit Judges, concurring in part and dissenting in part:

We gravely doubt whether the Resolution of the Richmond School Board qualifies as a "plan of desegregation." In approving it, however, the District Court expressed several careful reservations and cautions to the Board which we understand our brethren of the majority accept and adopt as part of their affirmance. In light of this, and in the hope of encouraging the Board so to administer the Resolution as to make it a genuine and effective plan of desegregation, we concur in that part of the majority's affirmance. We feel constrained, however, to make such concurrence tentative on the assumption that the Resolution is an interim measure only and will be subject to full review and reappraisal either at the end of the present school year, or certainly not later than this fall after the reopening of the 1965-66 school term, when the results of two years of the Resolution's operation will be known.

Concurring and Dissenting Opinions of April 7, 1965

I

The Richmond School Board, in reading the majority opinion, must keep in mind the teaching of the Supreme Court, and this court as well, in a stream of cases decided during the past decade: that the initiative in achieving desegregation of the public schools must come from the school authorities. The paper Resolution is not being hailed as the attainment of the final goal. The defendants have only stated an hypothesis—that once Negro pupils are given the right to choose where they want to go to school they will be in a position to avail themselves of the opportunity and the segregated school system will disappear. The majority opinion permits that hypothesis to be tested against the realities of the Richmond situation to determine whether it will in fact achieve the desired result.

Only experience will show whether the so-called plan represents a real change in the officials' attitude toward their constitutional duty, or merely a strategic retreat to a new position behind which the forces of opposition will regroup.

While we join in permitting this experiment, we are not fully persuaded that the plan will be enough to enable the Negro pupils to extricate themselves from the segregation which has long been firmly established and resolutely maintained in Richmond. A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment. The procedure cannot be separated from the spirit that produced it and will motivate its application.

As the defendants claim that theirs is the "Baltimore Plan" for free determination of school assignments, it is in order to examine not only the text but the context of the Baltimore Plan. There are reasons why a Free Transfer System could achieve a measure of success in Baltimore.

Maryland is a border state which in the Civil War remained in the Union by a very slim margin. Baltimore is only 150 miles from Richmond. Before the *Brown* decision the traditions of the people of the two cities in regard to public education were not divergent. Baltimore's City Code also required separate schools for Negroes. The reception accorded the decision of May 17, 1954, however, was markedly different. Within two weeks thereafter, the City Solicitor of Baltimore ruled that all laws imposing segregation could no longer be considered constitutional. The members of the School Board and other public officials organized no program of resistance. There was no holding back for contested lawsuits to wind their way through the courts nor were they content to pass a resolution casting upon Negro children and their parents the onus of ending the existing system.

Promptly the Board took the initiative to integrate. In less than a month after the Court spoke, the Superintendent of Schools assembled every teacher in the Baltimore school system. He addressed them at length on the duty to abolish racial separatism in public education in an effort to prepare them for such steps as needed to be taken to make the Supreme Court decision effective in practice.[1] Similar meas-

[1] The following passage appears in the address delivered to the 5000 Baltimore teachers by Dr. John H. Fisher, now Dean of

ures were taken by the School Board to enlist the active support of the Co-ordinating Council of Parent-Teacher Organizations, which included men and women of both races.

Other meetings were held throughout the city under the sponsorship of the Department of Education to make the transition from a segregated to an integrated nonracial administration as smooth as possible, and school faculties were encouraged to receive graciously new pupils and staff members of the other race.

From time to time the Board on its own initiative reexamined the practical operation of its policies to assure their effectiveness. Notable is its forthright declaration that "the presence whenever possible of qualified persons of varied ethnic, cultural, religious, and educational backgrounds on the staff of a given school, bureau or division is considered desirable." [2]

Sharply contrasting has been the course of events in Richmond. Ten years after the Supreme Court's decision outlawing segregation, and five years after the invalidation of Virginia's massive resistance laws by the Supreme Court of Appeals of Virginia as well as the federal court, the School Board's attitude, as presented by its attorneys in

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Education at Columbia University, then the Superintendent of the Baltimore Department of Education:

> "Without fear and without subterfuge, our Board has met its responsibility. Paraphrasing the words of Robert E. Lee, we cannot now do more than our duty, we shall not want to do less * * *."

[2] "Equality of Educational Opportunity—A Progress Report for the Baltimore City Public Schools" (1964).

this case, is that "there is no duty upon the School Board to integrate a particular school or desegregate it" or to "promote integration." A change from this attitude is imperative if the Richmond declaration, whether it is called a Resolution or a Plan, is to be constitutionally implemented.

A plan of desegregation is more than a matter of words. The attitude and purpose of public officials, school administrators and faculties are an integral part of any plan and determine its effectiveness more than the words employed. If these public agents translate their duty into affirmative and sympathetic action the plan will work; if their spirit is obstructive, or at best negative, little progress will be made, no matter what form of words may be used.

Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, "You now have a choice." In many instances the choice will not be meaningful unless the administrators are willing to bestow extra effort and expense to bring the deprived pupils up to the level where they can avail themselves of the choice in fact as well as in theory. A court, before approving a plan, must scrutinize it in detail to satisfy itself that the assumptions upon which the plan is predicated are actually present. The district judge must determine whether the means exist for the exercise of a choice that is truly free and not merely pro forma. This may involve considering, for example, the availability of transportation, the opportunity to participate on equal terms in the life of the school after the pupil's arrival, and any other circumstances that may be pertinent.

All recognize that the problems of education are not simple and are intertwined with problems in other areas of public and private activity. But while a complete solution does not lie in the hands of the present defendants, there is much they can do in their own sphere of responsibility to disestablish the heritage arising from imposed racial discriminations of the past.

It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated. However phrased, this thought must permeate judicial action in relation to the subject matter.[3]

This is far from suggesting that children are to be uprooted arbitrarily and bussed against their will to distant places merely to place them with children of the other race. No such thing has been proposed or contemplated in Richmond or, so far as we know, anywhere in this circuit. The true alternative, however, surely is not abdication of Board

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[3] Speaking of the district court's duty in a similar context, the Supreme Court said:

> "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

The Court also speaks of—

> "The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices * * *." Louisiana, et al. v. United States, 33 U. S. L. Week 4262 (U. S. March 8, 1965).

responsibility and the leaving of accomplishment of a non-racial educational system to the unaided efforts of individuals who, even if not deliberately obstructed, lack the knowledge and mastery of the school system possessed by the Board. The authorities, not these individuals, have the duty and power to provide adequate leadership in reaching, with a minimum of personal frictions, alarms and frustrations, the constitutionally protected goal of equal educational opportunity for all children. See Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1964).

II

There are certain features of the court's decision with which we are unable to agree. These concern the desegregation of faculties and staffs, the dissolution of the 1963 injunction, and the adequacy of the counsel fee awarded.

The composition of the faculty as well as the composition of its student body determines the character of a school. Indeed, as long as there is a strict separation of the races in faculties, schools will remain "white" and "Negro," making student desegregation more difficult. The standing of the plaintiffs to raise the issue of faculty desegregation is conceded. The question of faculty desegregation was squarely raised in the District Court and should be heard. It should not remain in limbo indefinitely. After a hearing there is a limited discretion as to when and how to enforce the plaintiffs' rights in respect to this, as there is in respect to other issues, since administrative considerations

are involved; but the matter should be inquired into promptly. There is no legal reason why desegregation of faculties and student bodies may not proceed simultaneously.

The "freedom of choice" plan being only an interim measure, the adequacy of which is yet unknown, this court should reinstate the June 3, 1963, injunction dissolved by the District Court when it approved the plan. In *Brooks* v. *Arlington County,* 324 F. 2d 303 (4th Cir. 1963), where an injunction had been dismissed by the District Court immediately after a school board adopted a resolution formally rescinding its policy of segregation, this court ordered reinstatement of the injunction. We there held the dismissal premature because there had been no showing by the school board of continuing compliance.

We also dissent from the allowance of only $75.00 as counsel fees to the plaintiffs, which we deem egregiously inadequate. It will not stimulate school boards to desegregate if they see that they can gain time by resisting to the eleventh hour without effective discouragement of these tactics by the courts.

The principle applied by this court in *Bell* v. *School Board of Powhatan County, Virginia,* 321 F. 2d 494 (4th Cir. 1963), needs to be extended, not narrowed. See Note, 77 Harv. L. Rev. 1135 (1964). It ought not to be reserved for the most extreme cases of official recalcitrance, but should operate whenever children are compelled by deliberate official action or inaction to resort to lawyers and courts to vindicate their clearly established and indisputable right to a desegregated education. Counsel fees are required in

simple justice to the plaintiffs. The award of fees in this equity suit is in the court's judicial discretion and should be commensurate with the professional effort necessarily expended. One criterion which may fairly be considered is the amounts found reasonable in compensating the Board's attorneys for their services. While public monies, aggregating thousands of dollars, are paid defense lawyers, the attorneys for the plaintiffs who have prosecuted these cases for two full rounds in the District Court and on appeal are put off with a miniscule fee of $75.00.

Judgment

[Filed and Entered, April 7, 1965]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9471

CAROLYN BRADLEY and MICHAEL BRADLEY, infants, by MINERVA BRADLEY, their mother and next friend, *et al.*,

Appellants,

—VS.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, H. I. WILLET, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. OGLESBY, ALFRED L. WINGO and E. T. JUSTIS, individually and constituting the Pupil Placement Board of the Commonwealth of Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record for the United States District Court for the Eastern District of Virginia, and was argued by counsel.

Judgment

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed with costs.

April 7, 1965.

CLEMENT F. HAYNSWORTH
Chief Judge, Fourth Circuit

Filed

April 7, 1965

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Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 416

RENEE PATRICE GILLIAM, *et al.*,

Petitioners,

v.

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, N. Y. 10019

S. W. TUCKER
HENRY L. MARSH, III
214 East Clay Street
Richmond 19, Virginia

Attorneys for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

RENEE PATRICE GILLIAM, *et al.*,

Petitioners,

—v.—

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, *et al.*,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on April 7, 1965.

Citations to Opinions Below

The memorandum opinion of the District Court of July 11, 1963 (R. I-43)[1] is unreported and is printed in the

[1] The record contains Volumes I to VI. Each volume begins with a page numbered 1. Thus record citations herein are to the volume and page number; the text above indicates Volume I, page 43. There is an additional transcript of a hearing March 23, 1964 (Testimony of Charles W. Smith) which is cited herein as "Smith Tr." (see Note 13, *infra*).

appendix hereto, *infra,* p. 1a. The opinion of the Court of Appeals issued May 25, 1964 (R. I-77), printed in the appendix hereto, *infra,* p. 15a, is reported at 332 F. 2d 460. Further unreported oral opinions of the District Court on April 6, 1964 (R. IV-23) and July 2, 1964 (R. V-42), appear in the appendix below at pages 9a and 22a, respectively. The second opinion of the Court of Appeals dated April 7, 1965 (R. VI-5), printed in the appendix, p. 27a, *infra,* is reported in 345 F. 2d 325.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1965 (R. VI-16; appendix, p. 37a, *infra*). Mr. Justice Goldberg on June 28, 1965 extended the time for filing the petition for certiorari until August 1, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Hopewell, Virginia school assignment plan based on geographic attendance areas is inadequate under *Brown* v. *Board of Education,* on the ground that it substantially preserves a segregated situation which was created by racial gerrymandering and related practices, and was not remedied by the board's inadequate pupil transfer rule?

2. Whether Negro pupils seeking desegregation of a public school system under *Brown* v. *Board of Education* are entitled to relief against a practice of segregating teachers on the basis of the race of pupils?

Statutes and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

This case involving racial segregation in the public schools of the City of Hopewell, Virginia, was filed October 17, 1962, by petitioners, a group of Negro parents and children,[2] who invoked the jurisdiction of the United States District Court for the Eastern District of Virginia seeking equitable relief pursuant to 28 U. S. C. §1343 and 42 U. S. C. §§1981 and 1983.[3] Petitioners sought an injunction against the city school board and superintendent and against the Virginia Pupil Placement Board, a state agency with statutory responsibilities concerning the assignment of pupils. Petitioners here seek review of the adequacy of a school board desegregation plan which was approved below after numerous hearings in the trial court and two appeals.

The complaint, brought as a class action under Rule 23(a), F. R. Civ. Proc., alleged *inter alia* that the school board "maintains and operates a bi-racial school system in which certain schools . . . are designated for Negro students only and are staffed by Negro personnel and . . . certain schools . . . are designated for white students and are staffed by white personnel"; that the defendants had not

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[2] The original plaintiffs were 9 children attending the public schools and their parents. Fifteen other pupils and their parents subsequently joined as intervenors.

[3] The complaint also alleged "federal question" jurisdiction under 28 U.S.C. §1331.

devoted efforts to initiate desegregation or made a start to effectuate a transition to a racially nondiscriminatory school system; that children were routinely assigned to schools on a racial basis; and that Negro children, including plaintiffs, who applied to white schools were refused enrollment on a discriminatory basis (R. I-2-12).

The complaint requested an order requiring admission of the 9 minor plaintiffs in specified all-white schools and more generally applicable injunctive relief against the segregated system and discriminatory practices. It included a request that the court enjoin defendants "from operating a biracial school system" or require them to submit a plan for "reorganization of the schools on a unitary nonracial basis" (R. I-11). The school authorities generally denied that the Negro children were entitled to relief (R. I-15, 17).

The case was tried before Hon. John D. Butzner[4] and on July 11, 1963, Judge Butzner filed an opinion (R. I-45) and entered an injunction requiring admission of the 9 pupils as requested, and enjoining further use of racially discriminatory criteria including the established attendance areas (R. I-54). The order invited the local authorities to submit a desegregation plan to the Court and stated that the general injunction would be suspended upon approval of a plan (*ibid.*).

At trial, it was established that Hopewell's 905 Negro students and 40 Negro teachers were completely segregated from the 3,530 white pupils and 133 white teachers in the 8 schools of the system. The white pupils and staff were assigned to three elementary schools and one high school

[4] The transcript of this first hearing on June 10, 1963, is Vol. III of the record.

and the Negroes were assigned to three different elementary schools and a high school as indicated in the margin.[5] Negro pupils who sought admission to white schools in 1960 and in 1962 were denied transfers.[6] Pupil assignments were made on the basis of a geographical attendance area map adopted in 1942 and occasionally modified thereafter.[7]

The map designated 6 attendance areas for the 6 elementary schools; three areas were all-white and three were all-Negro. Superintendent Smith testified that the boun-

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[5] The following chart was furnished by the school board December 4, 1962, in response to an interrogatory (R. I-25):

School	Capacity	No. White Pupils	No. Colored Pupils	No. White Teachers	No. Colored Teachers
Patrick Copeland Elementary	740	770	0	26	0
Harry E. James Elementary	330	0	167	0	7
Arlington Elementary	270	0	195	0	10
Dupont Elementary	870	832	0	29	0
Woodlawn Elementary	720	649	0	24	0
Carter G. Woodson Elementary	300	0	286	0	9
Carter G. Woodson High School	350	0	257	0	14
Hopewell High School	1075	1279	0	54	0

The school board's chart shows not only the pattern of student and faculty segregation, but also that the uniformly smaller Negro schools were under-utilized as compared to the large white schools which were either overcrowded or almost filled.

[6] Plaintiffs' Exhibit 8 lists seven 1960 applicants. With respect to 1962 applicants see complaint, para. 12 and schedule "A" (R. I-8, 13-14); Answer of Pupil Placement Board (R. I-17, 18); and Testimony of E. J. Oglesby (R. III-46-53).

[7] The board asserted that for many years pupils were assigned on the basis of attendance areas (R. I-26). A map showing these areas as then established is marked as Plaintiffs' Exhibit No. 7 (R. III-6).

daries had not ever been fixed to permit Negro and white children to attend the same schools (R. III-12). All high school pupils living in the areas of the 3 Negro elementary schools (Arlington, Woodson and James) were assigned to the all-Negro Woodson High School and all pupils in the 3 white elementary zones (Woodlawn, Dupont and Copeland) were assigned to Hopewell High School (R. III-32-33).

All eight school buildings were constructed or acquired during this period of complete segregation.[8] The trial court's injunction against the continued use of this set of attendance areas was based upon findings that the boundaries had been, for the most part, established prior to *Brown;* that the prescribed areas "follow the distribution of Negro and white residences in the city"; that some areas had "natural boundaries" but "in others there is no distinction other than the racial composition of the neighborhoods" (R. I-45); and that the school capacity and attendance figures provided "no rational criterion for the boundaries" (R. I-47). No Negroes lived in any of the white school zones. The few white children living in the area of a Negro school had in the past been granted transfers to a white school in another area (R. III-35-36, 40-41).

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[8] Virginia's massive resistance laws purported to require complete segregation and the closing of any desegregated schools until 1959. See a brief discussion of the massive resistance program in *Griffin* v. *School Board*, 377 U. S. 218, 221. The most recently constructed schools in Hopewell are the all-Negro Woodson Elementary and Woodson High Schools occupied in 1958 (R. III-10-11). The principal area served by Woodson Elementary School was a white residential neighborhood until about 1957 when Woodson School was begun and the whites moved away (R. IV-18-19). Before Woodson was constructed white children in the area attended the Dupont School across the railroad tracks to the north (*ibid.*).

No one appealed the July 11, 1963 injunction. However, on September 4, 1963, fifteen more Negro pupils moved to intervene and for further injunctive relief asserting that they had been refused admission to white schools in violation of the injunction (R. I-56-64). The Court heard evidence September 12, 1963,[9] and ruled that since no desegregation plan had been presented or approved the 15 intervenors were entitled to the requested transfers (R. II-41-48).

Thus, the first desegregation of regular classes in Hopewell took place in September 1963 when 26 or 27 Negro children entered two white schools.[10] The group included 24 petitioners (plaintiffs and intervenors) and 2 or 3 others living in the same neighborhoods (R. IV-12). The racially segregated pattern of school staffing continued unchanged (*ibid.*).

The school authorities appealed the September 13, 1963, order requiring admission of the 15 intervenors to white schools (R. I-66).[11] The trial court had set dates for the filing of a desegregation plan, objections to the plan, briefs and a hearing (R. I-67). Proceedings relating to the desegregation plan continued in the trial court while the appeal was being considered. On May 25, 1964, the Court of Appeals, voting 4-1, dismissed the appeal as moot on

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[9] See Record Volume II.

[10] Two of the plaintiffs had attended summer school at Hopewell High School in 1963 (R. II-19-20, 23-24). In September 1963 plaintiffs enrolled at Hopewell High and Copeland Elementary schools.

[11] The hearing was conducted as one for a temporary restraining order (R. II-2), but a permanent order was entered upon agreement that the court could finally decide the matter (R. I-66).

the ground that the academic year was nearly ended and that assignments for future years could be governed by the plan being considered in the trial court or a further interim order (R. I-77-81; 332 F. 2d 460).[12]

Meanwhile, during this appeal, the school board filed its first "Plan for Operation of Schools" and a motion to dissolve the injunction on October 21, 1963,[13] and the Court held a hearing on March 23[14] and April 6, 1964,[15] and rejected the proposed plan (R. IV-23-29).

The October 21, 1963, plan provided basically for assignments of pupils on the basis of a new attendance map (Defendant's Exhibit 1)[16] which made three changes of the boundaries on the prior map (Pl's Exhibit 7).[17] First, the boundary between the Patrick Copeland (white) and Harry

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[12] Judge Bryan dissented arguing that the rejection of the 15 requests on residential and procedural grounds was "entirely lawful" (R. I-82).

[13] The motion and plan as well as the attached map of proposed school zones may be found in that portion of the record on file in this Court which contains the exhibits. They are all marked Defendants' Exhibit 1 (DX-1). The school zone map (DX-1), is the one now in use. (The original map in file with this Court may be found folded flat with the other exhibits; it is not one of the rolled maps in the file.) A black and white photographic reproduction of this large multi-color map is at the end of the appendix hereto, *infra*.

[14] The March 23, 1964, transcript (Testimony of Charles W. Smith) was printed in Appellee Appendix in the Court of Appeals, but the original was by error omitted from the record. It has been filed in this Court by stipulation. It is cited as "Smith Tr."

[15] Record. Volume IV.

[16] See Note 13 *supra;* also the map at appendix hereto *infra*.

[17] Transcript of hearing on March 23, 1964, "Testimony of Charles W. Smith" (hereinafter cited as "Smith Tr."), pp. 13-16.

E. James (Negro) elementary schools was altered to conform to a railroad line placing about 51 Negro children in the Copeland area (Smith Tr. 14).[18] Second, the board changed a short portion of the boundary between Woodlawn (white) and Arlington (Negro) schools. This change was said to have incorporated three white homes into the Arlington zone (R. IV-14-15), but the Superintendent did not know whether this placed any white school children in the Negro school area (Smith Tr. 15). Third, the boundary was changed between the Dupont (white) and Woodson (Negro) schools to add a small triangular shaped enclave containing white homes (area bounded by railroad tracks in two directions and 15th Avenue) to the Woodson zone (Smith Tr. 16). The five white children in this area either moved or went to private schools when placed in the Negro zone (R. IV-13).

The plan continued the same pattern of high school assignments based on elementary school zones; pupils in the two all-white zones (Woodlawn, Dupont) and one predominantly white zone (Copeland) were assigned to Hopewell High and those in the 3 all-Negro zones (James, Arlington and Woodson) to Woodson High. The plan had two transfer provisions. One stated that transfers would be granted for "some specific reason," giving as an example the transportation convenience of a handicapped child, and that race would not be a factor in granting or refusing such transfers. The second, an explicitly racial provision, allowed transfer

[18] The earlier boundary between Copeland and James was a winding line between Negro and white residences which made approximately 20 turns and moved back and forth across a railroad line. Compare the first map, Pl's Ex. 7, with the second map, DX-1.

of "any colored child, assigned by reason of residence to a school in which he is in the racial minority" to an all-Negro school if both his parents and the board thought the non-segregated assignment was "detrimental" to the child. This latter provision was made severable in the event that the court thought it unconstitutional.

To summarize, the net effect of the plan was to permit a total of 51 Negro children to attend Copeland Elementary School or Hopewell High School and to leave the racial composition of the two other white schools and the four Negro schools unchanged.

Petitioners objected to the plan as inadequate and invalid under the Fourteenth Amendment on various grounds, including an objection to the map asserting that it was "an attempt to continue the discrimination previously enjoined" (R. I-74-75). This pleading also asserted that "the plan as a whole is inadequate in that it fails to make provision for the assignments or reassignments of teachers and other professional personnel on a nonracial basis" (R. I-75).

As previously noted the trial court rejected the plan April 6, 1964 (R. IV-23-29). The court noted that all pupils in the 3 white elementary zones were assigned to Hopewell High and all in the Negro zones to Woodson High; that the Hopewell enrollment exceeded its capacity while the Woodson enrollment did not;[19] and that white children from the Woodlawn zone "have to go a considerable distance

[19] The finding was based on Plaintiffs' Exhibit 1a, indicating in part:

September 1963	*Capacity*	*Enrollment*
Hopewell High	1,075	1,358
Woodson High	350	277

farther to Hopewell High School than if they were assigned to the Carter G. Woodson High School" and also "have to cross more railroad tracks and highways" (R. IV-26-27).

The Court also criticized the Arlington and Woodlawn boundary stating (R. IV-27):

> The area adjacent to the Arlington School zone, which presently feeds into the Woodlawn School, is predominantly white. The line has been drawn separating the predominantly white neighborhood from the predominantly Negro neighborhood.
>
> * * * * *
>
> The primary responsibility is, the Court recognizes for the School Board to draw these lines. But when it ends up, as it does, with a completely segregated school system, the Court is of the opinion that the language of the Court of Appeals in the *Brooks* case is pertinent. [Court then read from *Brooks* v. *County School Board of Arlington County, Va.*, 324 F. 2d 303, 308 (4th Cir. 1963).]

Two months later (June 4, 1964) the board filed an amended plan using the very same attendance areas which had been filed with the first plan and rejected on April 6, 1964 (R. I-84-86). But the new plan provided that elementary pupils in the Woodlawn and Arlington zones might transfer *if* "their residence is nearer an elementary school" outside their zone of residence (R. I-85). The plan also stated that high school students could transfer out of their zones *if* their "residence is nearer a high school other than the one to which" they are initially assigned (R. I-85). The racial minority transfer rule for Negro children was omitted

from the amended plan. Petitioners objected to the plan, basically adopting their exceptions to the first plan (R. I-95).

An examination of the attendance area map (Defendants' Exhibit 1; see appendix *infra*) shows at a glance that no part of the Negro Arlington area is nearer to the white (Woodlawn) school than to Arlington, although white residences in the Woodlawn zone are closer to Arlington than to Woodlawn since a portion of the Woodlawn zone is within 1 block of Arlington school.[20] Similarly, parts of Woodlawn zone are closer to the Negro Woodson High School than to Hopewell High but the Negro school zones are all closer to Woodson High than to Hopewell High (R. IV-26-27).

At a hearing on the amended plan (July 2, 1964; R. Volume V) the board filed the affidavit of Superintendent Smith (R. I-89) stating that the boundaries were the same as those previously submitted and that a survey showed that boundary changes suggested by petitioners' counsel to the school board would overcrowd Arlington and Woodson schools.[21] The affidavit also reported "expected enrollments" for several schools in September 1964 and some

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[20] See Def's Ex. 1. See also, testimony at the original trial at R. III-31.

[21] Petitioners did not propose any boundaries to the Court. They did suggest to the school board possible modifications of zones to include white pupils in 3 under-capacity Negro school zones, but did so tentatively without benefit of any survey of pupil residences. The school board did not present any data relating to the feasibility of any intermediate boundaries between its proposals and plaintiffs' suggestions.

new arrangements of classes.[22] No evidence other than the affidavit was offered at the hearing on the new plan (R. Volume V).

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[22] In order to make the enrollment and capacity figures more readily available and comprehensible, the following data is extracted from various exhibits, affidavits, etc.:

a. 1962-63 school year, see note 5, *supra;*

b. 1963-64 school year (September 1963); from plaintiffs' exhibit 1-A (4-6-64) (same document also marked Def's Exhibit 5):

School	*Capacity*	*Attendance*	*Pupil-Teacher Ratio*
Woodlawn	720	667	27.8
Dupont	870	858	30.1
Copeland	720	780	30.0
Hopewell High	1,075	1,358	31.5
Woodson High	350	277	19.7
James	300	150	15.0
Arlington	270	190	21.1
Woodson Elementary	300	280	28.0

c. Estimates for 1964-65 school year; from Smith affidavit (R. I-89-94) indicating "expected" enrollments:

School	*Capacity*	*"Expected Attendance"*
Woodlawn	720	712
Dupont	870***	858***
Copeland	720	780***
Hopewell High	1,250*	1,440
Woodson High	400**	250
James	300	150***
Arlington	270	234
Woodson Elementary	240**	220

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* Capacity increased by use of increased number of teaching periods; no new classrooms.

** Shift of 2 rooms from elementary to high school use changed capacities.

*** Figure based on previous year; no newer data supplied.

After hearing arguments[23] the trial court approved the school board's amended plan[24] stating:

> The chief difference between the situation that now exists and that which existed at the hearing this spring when the Court declined to approve the plan is that the new plan submitted by the Board provides for transfer of Arlington or Woodlawn Elementary pupils to any school nearer a pupil's residence. It also provides that high school students may transfer from the Hopewell High or Woodson High, as the case may be, to the high school which is nearer their residence.
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> • • • • •
>
> The Court finds that the School Board has attempted in good faith to create zones consistent with the capacity and attendance of the schools, and the Court believes that the plan which has been suggested is consistent with the suggestion made by the Court of Appeals pertaining to some other assignment method in the unsettled zones (R. V-44-45).

The Court ruled that the 24 Negro children assigned to white schools by prior court order could continue in those schools notwithstanding the fact that they lived in all-Negro zones, and entered an order approving the plan, dissolving the injunction and retaining the cause on the docket (R. I-97-98).

Petitioners appealed the order approving the plan and dissolving the injunction and the School Board cross-

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[23] The faculty desegregation issue was argued by plaintiffs (R. V-33-36).

[24] The oral opinion is at R. V-42-45.

appealed the order allowing the Negro litigants to continue in the white schools (R. I-99, 101).

The Fourth Circuit, *en banc,* affirmed on both appeals (345 F. 2d 325). The opinion of the Court by Judge Haynsworth said the trial court was justified in concluding that the boundaries were "reasonably drawn in accordance with natural geographic features and not on racial lines," that "de facto segregation" resulted from the residential patterns and that assignment by fair zones was constitutional. The Court affirmed the failure of the District Court to enter an order against faculty segregation citing its contemporaneous decision in *Bradley* v. *School Board of the City of Richmond,* 345 F. 2d 310 (4th Cir. 1964), where it said that pupils have standing to raise the issue to the extent it involved an asserted denial of their rights, but that the issue was ignored below and there was "no inquiry as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils" or of the impact of such an order. It said that the District Court had "a large measure of discretion" concerning "whether and when" to make an inquiry into faculty desegregation (345 F. 2d at 320).

The Fourth Circuit upheld the order permitting plaintiffs to remain in the schools they had entered under the earlier court orders notwithstanding this was inconsistent with the zoning plan saying that the trial court had a discretion to make such exceptions "as fairness and justice seem to it to require." Judge Bryan dissented in part arguing that the plaintiffs should be retransferred to the schools in their zones (345 F. 2d at 329).

Judges Sobeloff and Bell concurred separately agreeing that zone boundaries drawn without racial discrimination

may be accepted, but noting that "the size and location of a school building may determine the character of the neighborhood it serves" and that the school board "must keep in mind its paramount duty to afford equal educational opportunity to all children without discrimination; otherwise school building plans may be employed to perpetuate and promote segregation" (345 F. 2d at 329). Judges Sobeloff and Bell also stated that their concurrence was subject to the views expressed in their separate opinion of the same date in *Bradley* v. *School Board of the City of Richmond*, 345 F. 2d 310, 321.

In that case they dissented from the failure of the court to order desegregation of teaching staffs:

> The composition of the faculty as well as the composition of its student body determines the character of a school. Indeed, as long as there is strict separation of the races in faculties, schools will remain "white" and "Negro," making student desegregation more difficult. The standing of the plaintiffs to raise the issue of faculty desegregation is conceded. The question of faculty desegregation was squarely raised in the District Court and should be heard. It should not remain in limbo indefinitely . . . (345 F. 2d at 324).

Reasons for Granting the Writ

The approval of Hopewell's desegregation plan by the courts below presents questions of general public importance bearing on the extent to which the principle of *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, will be implemented in the states which have required public school segregation.

First, the case involves the adequacy of a school board's arrangements to satisfy its duty to disestablish a segregated school system which it created over the years by racially gerrymandering school attendance districts and related practices. It is important that this Court deal with this issue, even though it involves details of local assignment practices, in order to guide and encourage the lower federal courts to deal with the important detailed problems that ultimately determine whether *Brown* is implemented in any meaningful fashion where a school board is recalcitrant. As some districts retreat from massive resistance they may believe that segregation can be maintained by "sophisticated" rather than "simple minded" (cf. *Lane* v. *Wilson*, 307 U. S. 268, 275) techniques. To them it must be shown that their ingenuity should be directed at achieving compliance, not in avoiding it.

Second, there is a question on the level of principle rather than that of implementation. Faculty segregation is a matter of widespread concern in thousands of school systems. The teacher segregation problem, also presented in the companion petition for certiorari filed in *Bradley* v. *The School Board of the City of Richmond*, *supra*, is a

matter which cries out for prompt resolution by this Court. As we argue below, faculty segregation preserves the segregated all-Negro schools and prevents the creation of truly nondiscriminatory school systems. The United States Commissioner of Education in implementing Title VI of the Civil Rights Act of 1964 (42 U. S. C. A. §2000d) has announced in a general policy statement that "all desegregation plans shall provide for the desegregation of faculty and staff,"[25] but only a few courts have taken unequivocal action. The Commissioner of Education is faced with the problem of passing upon thousands of school district desegregation plans within a very brief period of time. To this end, he has established procedure whereby school boards may qualify for aid by filing with his office either an "Assurance of Compliance" (HEW Form 441), or a final court order requiring desegregation, or an acceptable plan for desegregation (General Policy Statement, *supra*, II).

The failure of the school board herein to act with respect to teachers apparently violates HEW requirements. Moreover, if HEW were to review the desegregation plan in operation in Hopewell it might disapprove of it. But the

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[25] General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, HEW, Office of Education, April 1964. The document, hereinafter cited as "General Policy Statement" is reprinted in the appendix to *Price* v. *The Denison Independent School District*, —— F. 2d —— (5th Cir. No. 21632, July 2, 1965), and in *Southern School News*, May 1965, pp. 8-9.

The Commissioner's action is clearly in accord with the intent of the legislative proponents of the Act. See the speech of Vice President (then Senator) Humphrey introducing Title VI in the Senate, clearly stating that the Commissioner can require "elimination of discrimination in employment or assignment of teachers" (110 Cong. Rec. 6325 (daily ed. March 30, 1964)).

"final court order" rule which HEW has adopted apparently insulates Hopewell from its scrutiny. Moreover, the general policy of HEW has been to impose requirements comparable to those required by the federal judiciary in the area. It is in the national interest that a uniform rule be announced by this Court.

I.

The Pupil Assignment Plan Approved Below Operates to Minimize Desegregation and Is Not Adequate to Correct Racial Segregation Created by Public Officials.

When this case commenced Hopewell's public school children were completely segregated by race in eight schools established on a racial basis by the use of school attendance areas adopted for the purpose of separating Negroes from whites. After prolonged litigation the courts below approved a plan sanctioning minimal changes. The approved plan employs school zones only slightly different from those used before, with the result that one formerly white elementary school and one formerly white high school have a few Negro pupils and the other schools remain as they were before the suit.

The trial court ultimately approved a plan based on attendance zones which it found were established on the basis of race prior to *Brown* v. *Board of Education, supra,* on the mistaken ground that a pupil transfer provision in the plan would alleviate the situation in the "unsettled zones" established for Woodlawn and Arlington Elementary Schools and for Hopewell and Woodson High Schools. Although the trial court had relied on the earlier Fourth

Circuit suggestion of some nongeographic assignment method in these areas (see 332 F. 2d at 462), the Fourth Circuit approved the plan on a different ground. It held (we believe erroneously) that the trial court had found the zones fair and nonracial, and added its own conclusion that this was so. Both courts employed the term *de facto* segregation to describe the results of the plan, thus ignoring the school board's role in creating and continuing the segregated situation and excusing its failure to ameliorate the situation it created.

The approved plan employed the very same school zones which the trial court denounced three months before as based on race resulting in segregation.[26] The trial court referred to the pupil transfer rules in the amended plan, which were only applicable to the specific areas previously criticized, as "the chief difference" between the plan approved and the plan rejected earlier (R. V-44).

However, this difference in the form of the plan made absolutely no difference in the results of the plan. The transfer rule, applicable only to elementary pupils in the Woodlawn and Arlington areas, and to high school pupils, allowed transfers out of attendance areas only for pupils who lived closer to a school outside their areas. The reality —as a glance at the map reveals—is that only white pupils

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[26] On April 6, 1964, Judge Butzner criticized the high school zones and the Arlington-Woodlawn elementary zones. He specifically said that the Arlington-Woodlawn boundary "line has been drawn separating the predominantly white neighborhood from the predominantly Negro neighborhood" (R. IV-27). Actually, the Woodlawn zone was "entirely," rather than "predominantly," white and there was no testimony that there were any white school children in the Arlington zone (Smith Tr. 15).

were so situated and no Negro pupils lived in areas where they could use this transfer rule. If white pupils were attempting to get transfers out of all-white schools to attend schools with Negro pupils and all-Negro faculties, the provision would indeed promote desegregation. But, as is well understood, that situation does not exist in Hopewell. Negroes were the ones who are seeking to end the segregated pattern in Hopewell. Thus, it was totally unreasonable to expect that any change in the racial composition of the schools would occur because of this transfer rule. The rule was meaningless because the Negroes who wanted transfers could not get them and the whites who could get transfers did not want them.

Considering the realities, it is not at all surprising that the Court of Appeals barely mentioned the transfer rule and placed little if any reliance on it to sustain the plan. But there is considerable irony in this because although the trial court had rejected the plan in the absence of the transfer feature, the Fourth Circuit approved the plan on the ground that the zones were fair and nonracial and asserted that the trial court supported this view.

There is no persuasive indication that the trial court on July 2, 1964, modified its April 6, 1964, finding that the zones were drawn on a racial basis to separate the Negro and white residential areas. The later opinion expressly embraced the earlier findings modifying them only to the extent to mentioning new data estimating school enrollments for the affected schools in the forthcoming (September 1964) term. There was no enrollment change which could be thought to have supported a different conclusion, since neither Arlington nor Woodlawn school was over-

crowded at any time during the litigation, while the pattern of overcrowding in the white high school and under-utilization of the Negro high school also continued throughout.[27] It cannot be gainsaid that Judge Butzner repeatedly indicated that the transfer feature of the new plan, which he conceived as consistent with the suggestion made by the Court of Appeals in its first opinion, was the principal basis for his approval of the plan. The one sentence in his oral opinion which lends any support to the view that he approved the zones was one in which he said that he thought the board was trying in good faith to create zones consistent with school capacity and attendance. Yet in this very sentence Judge Butzner again referred to the "unsettled zones" and the Fourth Circuit suggestion for another assignment method in those areas.

In any event, there are a variety of reasons why the zones should not have been approved by either the Fourth Circuit or the trial court (if it did approve them). The controversy focuses on the Woodlawn-Arlington Elementary boundary and also on the high school attendance pattern. We shall discuss them in that order, before reviewing several more general problems relating to the obligation of a school board to correct an unlawful system which it has created.

Throughout the case the Arlington-Woodlawn boundary has effectively separated the Negro and white pupils living on each side of the boundary between the two completely segregated schools. The boundary was drawn for this purpose at a time when segregation was mandated by Virginia

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[27] See statistics for 3 consecutive school years bearing this out in notes 5 and 22, *supra*.

law. Arlington, a small school at the western edge of the City has served the small Negro population in that area. Woodlawn, a larger school, serves the larger white population in the nearby area which comes within one block of Arlington School. Arlington, like all of the Negro schools, is much smaller than the white schools. None of the Negro schools has enrolled or is built to accommodate even half as many pupils as the smallest white school.

Although the Arlington area was based on race, the boundary accomplished this without any ingenious classical gerrymander. This boundary just ran along ordinary streets that separated the Negro and white pupils' residences. True to its purpose, the boundary did zone white pupils living just one block from the Negro school into a white school more than a dozen blocks away (R. III-31). But the racial residential pattern was such that there was no need for a meandering line forming a classical gerrymander with a grotesque shape.

Such a flagrant and obvious gerrymander in the classic sense had been used in Hopewell to separate the James and Copeland schools; the line meandered through 20 or more turns back and forth across a railroad track to separate Negro and white homes (see Pl's Ex. 7, the first zone map). The change of this gerrymander was the only alteration of the prior zones which has produced any actual desegregation of a school. The only Negro pupils in Hopewell entitled to attend a white school are approximately 51 children at the eastern side of the City who live in the area changed from James to Copeland. The high school pupils among this group of 51 are in the Hopewell High School zone accounting for the only high school desegregation under the plan.

The school board did make a slight change of the Arlington-Woodlawn boundary; it straightened one portion of the line which wound between Negro and white houses without affecting the school population (Smith Tr. 15). This change moved a short segment of the line from Arlington Road one block west to Wall Avenue (*ibid.*).

As noted, Judge Butzner condemned the boundary before and after it was altered (R. I-45; IV-27). But the Court of Appeals said that the boundary was logical and reasonable because the court said it followed "a main arterial highway" (345 F. 2d at 327). This determination that the line followed a highway is obviously based on a misunderstanding of the testimony. The school board never really claimed this, and the only trial court finding on the subject tends to show the contrary, as does the testimony. At the first trial, June 10, 1963, the superintendent, when asked if there was any barrier between Arlington and Woodlawn, replied: "No. There is no gully, ravine, that sort of thing. There is a street" (R. III-43). There was a finding to this effect (R. I-47). After the new map was adopted Superintendent Smith gave a great deal of testimony about this boundary in hearings on March 23 (Smith Tr. 20-26) and April 6, 1964 (R. IV-2-8, 14-18, 19), and an affidavit (R. I-92). In all of this testimony there was no claim that the boundary followed a main traffic route and there is testimony to the contrary.[28] There is a major road

[28] Some of the streets which constitute the boundary are Old Courthouse Road, Berry Street, Wall Avenue and Wall Street. Superintendent Smith said Old Courthouse Road "is not a major traffic artery, but it is used sometimes in getting to Route 36 . . . for people who live in this area" (Smith Tr. 22). There was no testimony that Berry Street was a major traffic artery. At one

in the area, a four lane highway along Palm Street and Plant Street (R. IV-16-17) which runs across the Woodlawn attendance area and across a small portion of the Arlington area but does not serve as a boundary at all.

The school board in arguing the case below has made much of the fact that a boundary change proposed to the board by petitioners would overcrowd Arlington School. But the fact remains that large numbers of white pupils do live closer to the Negro school, some of them within a block of Arlington and more than a dozen blocks from Woodlawn. The school board continues to assign them to the white school, the Superintendent saying: "Woodlawn School could hold them. There was no point taking them out of there" (R. IV-19). While Arlington could not accommodate every white pupil in the nearby area so long as the present number of Negroes are assigned there it could accommodate some of them. The number obviously depends on the number of Negroes living greater distances from Arlington than the whites who are assigned to Arlington. The present number of Negroes at Arlington also relates to the fact pupils in grades 6 and 7 in the Arlington area were recently returned to Arlington from the Woodson School (Superintendent's Affidavit, R. 91). The sum of the matter is that the school board, faced with a variety of courses of action, has consistently chosen the course of

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point the Superintendent said he thought Wall Street was going to be connected to Palm Street, an "arterial throughway" (Smith Tr. 23-24). But he acknowledged that there was no existing connection between Wall and Palm (Smith Tr. 24), subsequently retracted the original statement by saying that Wall and Palm would not connect (R. IV-3-4), and filed an affidavit that the connection might be at High Street and Palm (R. I-92). So Wall Street is not a highway, or connected to a highway, or even a through street (Smith Tr. 25-26).

action which maintains Arlington and Woodlawn Schools completely racially segregated. Petitioners submit that something more than this is necessary to satisfy the board's constitutional duty to undertake to reform the segregated situation which it deliberately created in the first place.

The high school attendance plan is even more patently designed to maintain racial segregation. All pupils in the areas of the three Negro elementary school zones are assigned to Woodson High and all pupils in the two all-white and one predominantly white elementary zones are assigned to Hopewell High. The Fourth Circuit upheld the zones based on the following reasoning: (1) The elementary zones are reasonable; (2) the high school zones are combinations of the elementary zones; *ergo,* (3) the high school zones are reasonable. The court's reasoning ignores the critical facts that the secondary schools have different enrollments, capacities, and locations than the various elementary schools.

The result of the high school zoning is shocking. The large white high school has been overcrowded consistently and remains overcrowded even with the school program altered by a special extended day operation to increase the capacity of the building without adding more rooms. The small all-Negro high school (about one-third the size of the white school) is significantly under-utilized operating on a regular school day basis.[29] This pattern is not compelled by any topographic features and residential pat-

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[29] The overcrowding at Hopewell High and under-utilization of Woodson High has existed at least since 1960. See enrollment statistics for November 1960 (Plaintiffs' Exhibit 11) and September 1962 (Plaintiffs' Exhibit 17c). The more recent enrollment data appears in notes 5 and 22, *supra*.

terns. Large numbers of white pupils live closer to the Negro high school than they do to Hopewell High. Some of these white pupils traveling to Hopewell High from the Woodlawn attendance area not only live closer to Woodson, but have to cross more railroad tracks and highways to get to Hopewell. Judge Butzner so found (R. IV-26-27).

The school board, before the suit was filed, maintained segregation by assigning all white children to Hopewell and all Negroes to Woodson. Hopewell High School was built in 1925 and expanded over the years to serve the white high school population (R. III-11). Carter G. Woodson High School was planned, located and built for Negroes during Virginia's massive resistance era; it opened in 1958 as an all-Negro school (R. III-11; IV-18-19). Woodson was built to accommodate approximately one-fourth of the pupils in a system where almost one-fourth are Negro, and assigned an all-Negro staff. It was located on the edge of the Negro ghetto, and white families in the area moved away during its construction (R. IV-18-19). Thus, the school segregation policy may have had a direct impact on the residential pattern. Certainly, it is true that the segregation system at the high school level was reenforced and concretized subsequent to the *Brown* decision by the erection of a new all-Negro high school. The school's location and size facilitates segregation. The court-approved plan allows a small number of Negro children living at the edge of the ghetto (Copeland area) to attend the white high school and leaves the pre-existing situation otherwise intact.

In discussing both high schools and elementary schools the court below uses the term *de facto* segregation and cites *Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209

(7th Cir. 1963), *cert. denied* 377 U. S. 924, a case involving distinct issues in a northern community. Whatever may be the constitutional obligation of school systems with racially imbalanced schools caused by varied conditions and policy decisions (see generally, Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," 78 Harv. L. Rev. 564 (1964)), this case presents the significantly different problem of a segregated school system which was carefully and deliberately established as such over a period of years under Jim Crow laws compelling segregation. The issues here relate to the duty of a school system to take the action necessary to eliminate the effects of its own deliberate and long sustained deliberate segregation policies. Segregation in Hopewell was actively fostered by locating schools of particular sizes on particular sites to accommodate Negro pupils (and only Negro pupils) and by drawing school zones to embrace the Negro population. Hopewell's case is much like that of New Rochelle, New York, where the courts required steps to undo the effects of past racial gerrymandering and transfer policies. *Taylor* v. *Board of Education,* 191 F. Supp. 181 (S. D. N. Y. 1961), *aff'd* 294 F. 2d 36 (2nd Cir. 1961); *cert. denied* 368 U. S. 940. The differences are that Hopewell's segregationist practices were open, compelled by law and much more recent than the gerrymandering in New Rochelle which was covert and occurred many years before the lawsuit.

Whatever might be said of Hopewell's geographic zoning plan for assigning pupils if it were appraised hypothetically in another context where there was no history of compulsory segregation, this case should be decided in its factual context against the background of school planning and

manipulation to foster segregation. Against that background it is reasonable to judge the plan by its results. A plan which leaves the four all-Negro schools completely segregated, and allows only about 50 Negro pupils to attend two of four white schools, plainly has not been adequate to eliminate the segregated situation created by past practices. Hopewell has exerted every effort to keep desegregation to a minimum, including twice appealing to the Court of Appeals to remove Negroes from white schools. The courts below have allowed Hopewell's board to succeed in minimizing desegregation by giving approval to the plan of geographic areas organized on a racial basis around schools located for Negroes. The artificiality of the present system is made entirely plain when one contemplates the fact that not one of the Negro schools has even one-half as many pupils as the smallest white school. The continuance of segregation cannot be justified by topography or alleged natural barriers such as railroad tracks which were ignored frequently in constructing zones to accomplish segregation prior to the lawsuit. Nor can school segregation be passed off as an inevitable consequence of residential patterns where schools have been deliberately established so as to conform exactly to the segregated housing pattern.

II.

Segregation of Public School Faculties Violates the Fourteenth Amendment and Should Be Abolished.

We submit that the courts below have erred in refusing to require Hopewell's public school authorities to end the practice of assigning all white teachers to white schools and all Negro teachers to Negro schools. Petitioners' view is that this segregationist practice of hiring and placing public school teachers on a racial basis is unconstitutional *per se* and has not the slightest justification under the Constitution. In a long series of cases since *Brown* this Court has invalidated state requirements of segregation in every context in which they have appeared.[30]

The only possible justification for withholding relief in this case is that petitioners who are public school pupils are not entitled to invoke the aid of the courts to halt the admittedly unlawful practice. Petitioners submit that the

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[30] In a unanimous opinion this Court said:

> ". . . [U]nder our more recent decisions any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

Colorado Anti-Discrimination Commission v. *Continental Air Lines*, 372 U. S. 714, 721.

See also, *Johnson* v. *Virginia*, 373 U. S. 61 (courtroom); *Bailey* v. *Patterson*, 369 U. S. 31 (transportation); *Peterson* v. *Greenville*, 373 U. S. 244 (restaurant); *Turner* v. *Memphis*, 369 U. S. 350 (airport restaurant); *Browder* v. *Gayle*, 352 U. S. 903 (buses); *Griffin* v. *School Board of Prince Edward County*, 377 U. S. 218 (schools); *Dawson* v. *Baltimore City*, 350 U. S. 877 (municipal beaches); *Holmes* v. *Atlanta*, 350 U. S. 879 (municipal golf courses).

unlawful practice is closely linked to their right under *Brown* v. *Board of Education*, 349 U. S. 297, to have the district courts supervise the effectuation of "a racially nondiscriminatory *school system*" (349 U. S. at 301, emphasis added). The Court in deciding the second *Brown* case, *supra*, pointed to administrative problems related to "the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations . . . ", as matters to be considered in appraising the time necessary for good faith compliance (emphasis added). We believe that the Court plainly regarded the task as one of ending *all* discrimination in school systems, including "personnel" as well as discrimination in the transportation system, attendance districts or the other factors mentioned. The delay countenanced by the "deliberate speed" doctrine was predicated on the assumption that dual school systems would be reorganized.

The brief of the United States, as *amicus curiae*, in *Calhoun* v. *Latimer*, 377 U. S. 263, argued in this Court that:

> Obviously, a public school system cannot be truly nondiscriminatory if the school board assigns school personnel on the basis of race. Full desegregation can never be achieved if certain schools continue to have all-Negro faculties while others have all-white faculties. Schools will continue to be known as "white schools" or "Negro schools" depending on the racial composition of their faculties. It follows that the school authorities must take steps to eliminate segregation of

personnel as well as pupils. (Brief of the United States, pp. 39-40.)

The Court in *Calhoun* vacated the judgment without discussion of this issue. We submit that this case presents an appropriate occasion to consider this question.

Faculty segregation was an integral part of the segregated school systems maintained under the separate but equal doctrine. It was the well-known general practice that Negroes taught only Negroes and whites taught only whites. Virginia law encourages teacher segregation by providing that teachers may terminate their contracts when pupils are desegregated "or both white and Negro teachers shall have been employed in the school to which the contracting teacher is assigned." [31]

An all-Negro faculty is as sure an indicator that a school is a "Negro" school as a racial sign over its door. Judges Sobeloff and Bell were plainly right in their dissent in the Richmond school case[32] where they said that "composition of the faculty as well as the composition of its student body determines the character of a school," and that with "strict separation of the races in faculties, schools will remain 'white' and 'Negro,' making student desegregation more difficult." [33]

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[31] Code of Va., 1950, §22-207 (1964 Replacement Vol.). The above-quoted provision encouraging faculty segregation was adopted in 1962. (Va. Laws 1962, c. 183.) Under Virginia law division school superintendents have authority to assign and reassign teachers. Code of Va. 1950, §22-205.

[32] *Bradley* v. *School Bd. of City of Richmond, Va.*, 345 F. 2d 310, 324 (4th Cir. 1965).

[33] *Id.* at 324.

But the Fourth Circuit has not stated its clear disapproval of faculty segregation in any of the cases in which it has considered the matter[34] and apparently has adopted the view that faculty desegregation must depend upon some kind of evidentiary showing by plaintiff Negro pupils that

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[34] Faculty segregation was first considered by the Fourth Circuit in *Jackson* v. *School Board of the City of Lynchburg*, 321 F. 2d 230, 233 (4th Cir. 1963), where it held that a complaint asking for desegregation of a school system was sufficient to raise the question. See also, *Griffin* v. *Board of Supervisors*, 339 F. 2d 486, 493 (4th Cir. 1964); *Bowditch* v. *Buncombe County Board of Ed.*, 345 F. 2d 329, 332, 333 (4th Cir. 1965); *Wheeler* v. *Durham City Board of Education*, —— F. 2d —— (4th Cir. No. 9630, June 1, 1965), and, of course, the *Bradley* case, *supra*, and the instant case.

In the Fifth Circuit see: *Board of Public Instruction of Duval County* v. *Braxton*, 326 F. 2d 616, 620 (5th Cir. 1964), *cert. denied* 377 U. S. 924 (affirming a trial court order requiring a faculty desegregation plan). See also *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (5th Cir. 1962); *Calhoun* v. *Latimer*, 321 F. 2d 302 (5th Cir. 1963), *vacated and remanded* 377 U. S. 263.

The Sixth Circuit has twice held that it was proper for pupils and their parents to raise the issue of segregation of teachers. *Mapp* v. *Board of Education of City of Chattanooga*, 319 F. 2d 571, 576 (6th Cir. 1963); *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 666 (6th Cir. 1964).

Several other courts have discussed the question of segregation of teachers with a variety of results. *Brooks* v. *School District of City of Moberly, Mo.*, 267 F. 2d 733 (8th Cir. 1959), *cert. denied* 361 U. S. 894 (1959); *Franklin* v. *County School Board of Giles County*, Civil No. 64-C-73-R, W. D. Va., June 3, 1965; *Christmas* v. *Board of Education of Harford County*, 231 F. Supp. 331 (D. Md. 1964); *Nesbit* v. *Statesville City Board of Education*, 232 F. Supp. 288 (W. D. N. C. 1964), *vacated*, 345 F. 2d 333 (4th Cir. 1965); *Tillman* v. *Board of Instruction of Volusia County, Florida*, Civil No. 4501, 7 Race Rel. L. Rep. 687 (S. D. Fla. 1962); *Manning* v. *Board of Public Instruction of Hillsborough County, Fla.*, Civil No. 3554, 7 Race Rel. L. Rep. 681 (S. D. Fla. 1962); *Lawrence* v. *Bowling Green, Ky. Board of Education*, Civil No. 819, 8 Race Rel. L. Rep. 74 (N. D. Ky. 1963); *Mason* v. *Jessamine County, Ky. Board of Education*, Civil No. 1496, 8 Race Rel. L. Rep. 75 (E. D. Ky. 1963); *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (N. D. Okla. 1963).

they are disadvantaged by the practice in the circumstances of the particular case. That is the only reasonable explanation for the Fourth Circuit's repeated statements in cases where the existence of faculty segregation is undisputed, that there was insufficient showing that faculty segregation was a denial of plaintiffs' constitutional rights. The Fourth Circuit apparently accepts the standing of pupils to litigate the question but demands that they prove that faculty segregation is a discrimination against them—as opposed to a discrimination against the teachers themselves.

But, as Judges Sobeloff and Bell have said, faculty segregation obviously makes student desegregation more difficult. A school board decision that it is willing to assign some Negro pupils to classes with white pupils and white teachers but that it is unwilling to assign white pupils to classes with Negro teachers obviously limits the range of choices the board has when it determines pupil assignment patterns or attendance areas. The Negro faculty school obviously continues as a school for Negro pupils only. To the extent that students or parents are given a choice between schools, faculty segregation encourages them to make their choice on a racial basis. The very existence of faculty segregation reflects the school authorities' judgment that the race of teachers is significant and makes a difference. Cf. *Anderson* v. *Martin*, 375 U. S. 399. This is obvious in the context of states where school segregation has been defended vigorously by public officials for a decade since *Brown*.

Faculty segregation assures continuance of the prevailing trend of one-way desegregation, i.e., movement of Negro pupils to formerly white schools without any corresponding movement of white pupils to Negro faculty

schools. Throughout the southeast part of the country there are few exceptions to this brand of desegregation which leaves the "Negro" school intact with an all-Negro student body and faculty.

It is estimated that there are 419,199 white teachers and 116,028 Negro teachers in 11 southern states, 6 border states (excluding Maryland) and the District of Columbia.[35] In 1963-64, Virginia public schools employed 31,443 white teachers and 9,051 Negro teachers.[36] There were 733,524 white pupils and 34,176 Negro pupils (total 967,700).[37] Of 128 districts with Negro and white pupils, 81 districts had at least one Negro pupil in school with whites in November 1964, but only five of those districts had Negroes teaching in school with whites.[38] There was no faculty desegregation in Alabama, Georgia, Louisiana, Mississippi and South Carolina.[39] One North Carolina district, 2 Florida districts, and 7 Tennessee districts had some faculty desegregation, and one Arkansas district had a Negro supervisor of elementary schools but no Negro teachers in desegregated classes.[40]

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[35] Southern Education Reporting Service, Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 14th Rev. (Nov. 1964), p. 2.

[36] *Id.* at 59.

[37] *Ibid.*

[38] *Ibid.* The summary reports: "Some Negro teachers are teaching in schools with whites in Alexandria and Roanoke, and in Arlington and Fairfax Counties. In Prince Edward County, nine of the 68 teachers in the county's one high school and three elementary schools are white."

[39] *id.* at 2.

[40] *Id.* at 8, 15, 39, 50.

Within the Negro community Negro teachers generally are recognized as having a leadership role with a comparatively high economic position,[41] but their potential as leaders in efforts to promote desegregation of public facilities and schools is limited by the vulnerability of their position as employees of segregationist state agencies.[42] Continued faculty segregation, posing the danger of discharge of Negro teachers as Negro pupils go to white schools where no Negro teachers are assigned, threatens potentially disastrous social consequences for one of the most important social and economic groups in Negro communities in the South.

A recent decision by Judge Michie in the Western District of Virginia enjoined school authorities who discharged every Negro teacher in a small system when the schools desegregated (*Franklin* v. *School Board of Giles County*, —— F. Supp. ——, W. D. Va., Civ. No. 64-C-73-R, June 3, 1965). Other cases involving Negro teachers discharged

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[41] According to the 1960 census the median income for the non-white family was $3,662, but the median for the non-white family whose head was employed as an elementary or secondary teacher was $6,400 (1960 Census of Population, Vol. I, "Characteristics of the Population," Part I, U. S. Summary, Table 230, pp. 1-611).

[42] Lamanna, Richard A., "The Negro Teacher and Desegregation", Sociological Inquiry, Vol. 35, No. 1, Winter 1965. Alabama has enacted 7 laws to permit firing of teachers who advocate desegregation (1956 1st Sp. Sess., Acts 40, 41; 1957 Sess., Act 239, 361; 1961 Sp. Sess., Acts 249, 383, 443). Arkansas laws prohibited NAACP members from holding public employment and required teachers to list organization membership until *Shelton* v. *Tucker*, 364 U. S. 479. A series of Louisiana laws provided for dismissal of public employees advocating integration (La. Acts 1956, Acts 248, 249, 250, 252). Until challenged in court South Carolina barred public employment of NAACP members (S. C. Acts 1956, Act 741), repealed by Act 223 of 1957. See *Bryan* v. *Austin*, 148 F. Supp. 563 (E. D. S. C. 1957), *judgment vacated* 354 U. S. 933.

coincident with desegregation are pending in various district courts. (A partial listing of communities where such cases were recently filed includes Morganton, N. C., Hendersonville, N. C., Asheboro, N. C., Pitt County, N. C., Stanton, Texas, and Wagoner, Oklahoma.)

Petitioners submit that faculty segregation *per se* violates the constitutional rights of Negro pupils because of its inevitable tendency to impede desegregation of pupils. In recognition of this the United States Commissioner of Education, implementing Title VI of the Civil Rights Act of 1964,[43] has announced the following ruling to all school districts submitting plans for desegregation in order to qualify for federal financial aid (General Policy Statement, *supra,* Part V.B.):

> 1. *Faculty and staff desegregation.* All desegregation plans shall provide for the desegregation of faculty and staff in accordance with the following requirements:
>
> a. *Initial assignments.* The race, color, or national origin of pupils shall not be a factor in the assignment to a particular school or class within a school of teachers, administrators or other employees who serve pupils.
>
> b. *Segregation resulting from prior discriminatory assignments.* Steps shall also be taken toward the elimination of segregation of teaching and staff personnel in the school resulting from prior assignments based on race, color, or national origin (see also, V.E. 4(b)).

[43] 42 U. S. C. A. §2000d.

The General Policy Statement also indicates that HEW will not accept an "Assurance of Co. pliance" (HEW Form 441) from any school system in which "teachers or other staff who serve pupils remain segregated." We submit that the determination by the United States Commissioner of Education that faculty desegregation must be included in order for a desegregation plan to be "adequate to accomplish the purposes of the Civil Rights Act" is entitled to substantial weight. Furthermore, the Commissioner's determination implements the clear intent of the Civil Rights Act as expressed by congressional proponents of Title VI. Vice President (then Senator) Humphrey clearly expressed the view that Title VI authorized the Commissioner to require elimination of teacher segregation when introducing the provision in the Senate:

> 'In such cases the Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students. See *Board of Education* v. *Braxton* . . .
>
> This does not mean that Title VI would authorize a federal official to prescribe pupil assignments, or to select a faculty, as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers and authority to achieve compliance with that requirement by cutting off funds or by other means authorized by law. (110 Cong. Rec. 6325 (daily ed. March 30, 1964).)

The Fourth Circuit has not indicated any justification for the policy of assigning teachers on the basis of the race of the pupils, and the school authorities have not suggested any. Nor have the school authorities made any effort to establish that there are administrative obstacles to faculty desegregation justifying delay under the doctrine of the second *Brown* decision (349 U. S. at 300-01). But in the *Bradley* case, *supra* (relied upon in deciding this case), the Fourth Circuit apparently embraced the idea that teacher assignments in accord with the race of pupils were acceptable and seems to have assumed that there were administrative problems in faculty desegregation which justified delays. The Court said:

> The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, *assignment of teachers may be expected to follow the racial patterns established in the schools.* An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils. (345 F. 2d at 320-321; emphasis supplied.)

There was no explanation of why the teachers assignment patterns should follow the racial patterns of pupils, and no discussion of the duty of the school board to make

initial teacher assignments in the future on a nonracial basis. The opinion contains no indication that it is the responsibility of a school board to hire and place new employees without regard to race and to develop a plan for faculty reorganization; or that the board has the burden of establishing the existence of any administrative problems proffered to support delay under the deliberate speed doctrine.

A policy of assigning teachers to schools on the basis of the race of the pupils is plainly invidious even without regard to its effect on what schools various pupils attend. Pupils admitted to public schools are entitled to be treated alike without racial differentiations in those schools. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. The student's relationship with teachers is central to the educational experience in public schools. When a state decrees that those Negro pupils in all-Negro schools be taught only by Negro teachers and that those Negro pupils in schools with white children be taught only by white teachers, it significantly perpetuates the segregation of Negro Americans in their educational experience. This is contrary to the egalitarian principle of the Fourteenth Amendment and the teaching of *Brown* that segregated education is "inherently unequal."

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for certiorari should be granted.

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, N. Y. 10019

S. W. TUCKER
HENRY L. MARSH, III
214 East Clay Street
Richmond 19, Virginia

Attorneys for Petitioners

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APPENDIX

Memorandum of the Court

[Filed July 11, 1963]

Nine Negro students and their parents instituted this action to require the defendants to transfer the students from Negro public schools to white public schools. The plaintiffs filed their suit as a class action on behalf of all persons similarly situated and prayed that the defendants be enjoined from denying any students admission to a white school on the basis of race.

The defendants answered, generally denying that the plaintiffs are entitled to the relief which they seek.

The City of Hopewell operates the following public schools which are attended by white pupils:

	Capacity	*Attendance*
Patrick Copeland Elementary	740	770
DuPont Elementary	870	832
Woodlawn Elementary	720	649
Hopewell High School	1,075	1,279

The City also operates the following schools which are attended by Negro pupils:

	Capacity	*Attendance*
Harry E. James Elementary	330	167
Arlington Elementary	270	195
Carter G. Woodson	300	286
Carter G. Woodson High School	350	257

The plaintiffs, who sought transfer to Hopewell High School, were denied assignment primarily because they

lived outside the "long established attendance area." Assignments to public schools in Hopewell are made according to geographical attendance areas. The Pupil Placement Board usually makes formal assignment upon the recommendation of the City School Board.

The attendance areas for the several schools were established prior to the decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Minor changes have been made from time to time. The areas follow the distribution of Negro and white residences in the city. In some instances the areas are defined by natural boundaries; in others there is no distinction other than the racial composition of the neighborhoods.

The attendance areas for Arlington School, Carter G. Woodson School and Harry E. James School lie generally south of the Norfolk and Western Railway tracks. The Harry E. James School attendance area is bounded on the west by the railway classification yard. The Seaboard Air Line Railroad forms the boundary between Arlington School and Carter G. Woodson School. The defendants argue that for reasons of safety and convenience the tracks form natural boundaries for these areas. Some of the Harry E. James School attendance area lies to the north of the tracks. A ravine isolates a part of this area from the Patrick Copeland School area.

If the boundaries of the attendance areas had been located only with reference to the tracks and ravine, the defendants' argument would have considerable merit. However, the tracks have not been used consistently as bound-

aries. The same Norfolk and Western tracks bisect the Woodlawn school attendance area. The Seaboard Air Line tracks cross the DuPont School area. Portions of the DuPont and Patrick Copeland school areas lie south of the Norfolk and Western tracks, and part of the Harry E. James School area lies north of the tracks. Also there is no natural barrier between the Woodlawn School area and the Arlington School area.

The capacity of the schools, compared with the attendance of the students, provides no rational criterion for the boundaries which have been selected. For example, the Patrick Copeland School has a capacity of 740 students, with attendance of 770. Adjacent to this school area is the Harry E. James School with a capacity of 330 but only 167 in attendance. Nevertheless a portion of the Patrick Copeland School area flows across the railway tracks into the Harry E. James School area. Hopewell High School for white students has approximately 200 students over its capacity. The Carter G. Woodson High School for Negro students has approximately 100 students less than capacity.

On one occasion white students whose family moved into a Negro residential area were enrolled in a white school instead of the school which served the attendance area of their residence. This was done, in part, because the family intended to build a home in a white residential area.

In *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955), the Court said:

> "While giving weight to these public and private considerations, the courts will require that the defen-

dants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

This case falls within the language of *Brown* pertaining to "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis."

The racial composition of neighborhoods may result in predominantly white or predominantly Negro school districts even after the areas have been reshaped to comply

with the mandate of *Brown*. This, in itself, would not be a badge of unconstitutionality. *Thompson* v. *County School Board of Arlington County, Virginia,* 204 F. Supp. 620 (E. D. Va. 1962). The existence of this situation was recognized in *Dillard* v. *School Board of the City of Charlottesville,* 308 F. 2d 920 (4th Cir. 1962). The vice of the Charlottesville plan was not the composition of its attendance areas. The plan was invalid because of its unconstitutional provision for the transfer of students who found themselves in a racial minority. *Goss* v. *Board of Education,* 31 U. S. L. Week 4559 (U. S. June 3, 1963).

The use of race to establish residential requirements for school assignments has been held invalid in this Circuit. In *Green* v. *School Board of the City of Roanoke, Virginia,* 304 F. 2d 118, 122 (4th Cir. 1962), Chief Judge Sobeloff wrote:

> "This court has on several occasions recognized that residence and aptitude or scholastic achievement criteria may be used by school authorities in determining what school pupils shall attend, so long as racial or other arbitrary or discriminatory factors are not considered. See, e.g., Dodson v. School Board of City of Charlottesville, Virginia, 289 F. 2d 439, 442 (4th Cir., 1961); Jones v. School Board of City of Alexandria, Virginia, 278 F. 2d 72, 75 (4th Cir., 1960). But if these criteria, otherwise lawful, are used in a racially discriminatory manner, the resulting assignment is not saved from illegality. As we have more than once made clear, school assignments, to be constitutional,

must not be based in whole of in part on consideration of race."

In *Evans* v. *Buchanan*, 207 F. Supp. 820, 824 (D. Del. 1962), the distinction between valid and invalid attendance areas is clearly drawn:

> "There have been many lower court decisions since the Brown case held children may not be denied entrance to public schools solely on the basis of race. One of the teachings of these cases is that whether Negro children are deprived of their constitutional rights is a question of fact. Criteria such as transportation, geography and access roads are rational bases for establishing public attendance areas or designating school districts. If, however, these criteria are merely camouflage and school officials have placed children in particular districts solely because of race, a cause of action under the Constitution exists."

The Court concludes that the application of the foregoing principles to the facts in this case demonstrates that the present attendance areas do not satisfy the requirements set forth in *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955).

The plaintiffs, who sought admission to Hopewell High School, also were denied assignment to that school because of the distance from their residences to the school. White students were admitted to Hopewell High School regardless of the distance of their residences from the school.

The Court concludes that the reasons assigned for denying admission to the plaintiffs were constitutionally discriminatory.

These students were also denied admission for failure to follow established procedure. Two students seeking admission to Patrick Copeland Elementary School were denied admission because they failed to apply on an official blank. One application to Hopewell High School was "filed too late." It is quite obvious, however, that the primary reason that all students were denied admission was because of the defendants' rigid adherence to the long established attendance areas. Under these circumstances it is well settled that failure to exhaust administrative remedies is not a defense. *McNeese* v. *Board of Education*, 31 U. S. L. Week 4567 (U. S. June 3, 1963); *Bell* v. *School Board of Powhatan County, Virginia*, No. 8944 (4th Cir. June 29, 1963).

The Court further concludes that a general injunction should be granted against the school officials prohibiting racial discrimination in the admission of students to schools and from assigning students on the basis of the school attendance areas currently existing. The defendants may submit to the Court a more definite plan providing for immediate steps looking to the termination of discriminatory systems and practices. *Bradley* v. *The School Board of the City of Richmond, Virginia*, No. 8757 (4th Cir. May 10, 1963).

The plaintiffs also pray that the defendants be required to pay costs and attorneys' fees. In *Bell* v. *School Board of Powhatan County, Virginia*, No. 8944 (4th Cir. June 29,

1963), the Court of Appeals, pointing to "* * * the long continued pattern of evasion and obstruction * * *" on the part of the defendants, allowed attorneys' fees. The Court does not find that the same situation exists in this case, and the prayer for attorneys' fees is denied. Costs will be allowed.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

July 11, 1963

Ruling of the Court

[April 6, 1964]

The Court: Gentlemen, the situation in Hopewell is rather unusual in Virginia. Most Virginia cities have the Negro population and the white population scattered through them. In Hopewell, for some reason—possibly because it is largely an industrial city—but for some historic reason, the Negro population and the white population occupy generally different residential zones. In that respect, it is somewhat like many of the cities of the North where the great issue before the Courts is one of de facto segregation.

There is a split of authority concerning that situation. Some of the New York courts have condemned the de facto segregation, and opposed to them is the case of *Bell* v. *School Board of Gary,* which is reported in 32 Law Week 2219 (7th Cir. 1963).

The starting point for consideration of these cases is, of course, *Brown* v. *Board of Education,* 349 U. S. 294 (1955). That is the second Brown case, where at page 300, the Court said:

> "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regu-

lations which may be necessary in solving the foregoing problems."

Then the Court goes on to speak about the period of transition to achieve such a school system; and in more recent cases, has indicated that period of transition has about completed its course.

The Court is of the opinion that the Court of Appeals for the Fourth Circuit has interpreted Brown to justify, or to permit school districts based on neighborhoods which may or may not result in predominantly white or Negro schools.

The Court realizes that the exact problems presented by this case have not been considered by the Court of Appeals for the Fourth Circuit, but it has come to the conclusion, which it mentioned through consideration of *Dillard* v. *School Board of the City of Charlottesville,* 308 F. 2d 920 (4th Cir. 1962). The trouble with the Charlottesville plan was not the composition of its attendance areas. The Court recognized that they were not gerrymandered. The plan was invalid because of the provision for transfers.

This case was before this Court previously on July 11, 1963. The Court filed a memorandum, which must be considered in its decision today. There is no need of repeating all of it, but that decision will be incorporated in the decision of the Court today.

The Court finds that the school zones are as set out in the map which has been filed as an exhibit; that the capacity of the several schools, their attendance, the pupil-teacher

ratio, as of May 1963 and as of September 1963, are as set forth in Plaintiffs' Exhibit 1A, with the exception that the Court does find from the testimony that the capacity of the James School is 300 in May 1963 and not 330 as set forth in the exhibit. I am going to mark that exhibit so it can be more readily understood to write after the word "Hopewell," the word "High," as counsel have indicated at the Bench during the trial; and after "Woodson," the word "High;" and the bottom Woodson will be called "Elementary." That is what the evidence showed, and it simply makes the exhibit plainer to understand.

The question, then, before the Court is primarily one of fact. The Court is of the opinion that the law, as set forth in *Bell* v. *Indiana School District,* is consistent with the law that has been applied by the Court of Appeals for the Fourth Circuit. We do not have the question of law before us concerning de facto segregation.

The Court believes that this conclusion is also consistent with *Brown* v. *Board of Education,* 349 U. S. 294 (1955). The plan, to conform with *Brown,* would have to take into consideration the language of *Brown,* which the Court has previously mentioned. As far as assignment of students is concerned, it would be the "revision of school districts and attendance areas into compact units to achieve a system of determining admission to public schools on a nonracial basis."

Turning to the factual situation which is before the Court, the Court finds that the plan contemplates that all of the children presently attending the Patrick Copeland Elementary School, the Dupont Elementary School, and the

Woodlawn Elementary School are assigned to the Hopewell High School. These elementary schools are predominantly white schools, and Hopewell High School is predominantly a white school.

The children attending the Harry E. James Elementary School, the Arlington Elementary School, and the Carter G. Woodson Elementary School all attend the Carter G. Woodson High School. These elementary schools are predominantly Negro, and the Carter G. Woodson High School is predominantly Negro.

The capacity of Hopewell High School is overtaxed. The capacity of the Carter G. Woodson High School has not been reached.

The pupil-teacher ratio also shows a large discrepancy with a higher pupil-teacher ratio than the Hopewell High School.

Contrasted with that is the situation of the Woodlawn Elementary School zone. Children from that zone have to go a considerable distance farther to Hopewell High School than if they were assigned to the Carter G. Woodson High School. They also have to cross more railroad tracks and highways.

The area adjacent to the Arlington School zone, which presently feeds into the Woodlawn School, is predominantly white. The line has been drawn separating the predominantly white neighborhood from the predominantly Negro neighborhood.

Now, the Court recognizes that, as counsel have said, you could draw a line, or suggest drawing lines, any place,

and that the School Board has exercised its discretion in drawing the line where it did along Wall Street—or Wall Avenue. If that caused an imbalance, say, from 30 to 40 per cent—didn't quite bring it out to 50 per cent—white and Negro, why, the Court would certainly follow that line of reasoning. The primary responsibility is, the Court recognizes, for the School Board to draw these lines. But when it ends up, as it does, with a completely segregated school system, the Court is of the opinion that the language of the Court of Appeals in the *Brooks* case is pertinent.

That language is in *Brooks* v. *County School Board of Arlington County, Virginia,* 324 F. 2d 303 (4th Cir. 1963), page 308. There, the Court of Appeals, speaking of the District Court for this District said:

> "The District Court's finding that there is no evidence to sustain the charge that geographical boundaries were established to maintain segregation is clearly erroneous. The testimony offered in the 1957 hearing was made a part of the record in this case. There the Division Superintendent of Schools, called by the plaintiffs as an adverse witness, testified that the Hoffman-Boston facility was established as the only Negro senior and junior high school for the entire county; that this action was based entirely upon race; that the boundaries of the three elementary school districts were fixed in a like manner; and that later the Pupil Placement Board assigned approximately 2000 pupils of all grades, and in each instance without exception whites were assigned to white schools and Negroes to Negro schools, effectively freezing white and Negro

children in their racially segregated schools. By stipulation it appears that since the 1957 hearing, except for the disjunction of the non-contiguous northern territory, the districts remain unchanged."

This case presents a number of unusual and different problems, which have not been considered by the Court of Appeals for this Circuit, insofar as the Court has been advised through counsel's research, and insofar as the Court itself knows; and also problems that have not been considered by the District Courts in this Circuit. Nevertheless, applying the principles which have been expressed in *Brown* and in *Gary* and in *Brooks,* the Court is of the opinion that the plan does not satisfy the requirements which have been stated by the appellate courts. For that reason, the motion to approve the plan is denied.

• • •

Opinion Dated May 25, 1964

[Filed May 25, 1964]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9258

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and mother and next friends, *et al.*,

Appellees,

versus

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia; and E. J. OGLESBY, ALFRED L. WINGO and E. T. JUSTIS, constituting the Pupil Placement Board of the Commonwealth of Virginia,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
JOHN D. BUTZNER, JR., District Judge.

(Argued April 27, 1964. Decided May 25, 1964.)

Opinion Dated May 25, 1964

Before:

SOBELOFF, *Chief Judge,*

HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL,
Circuit Judges, sitting en banc.

Frederick T. Gray and A. B. Scott (Robert Y. Button, Attorney General of Virginia, R. D. McIlwaine, III, Assistant Attorney General, and Williams, Mullen and Christian, and Peyton, Beverley, Scott and Randolph on brief) for Appellants, and Henry L. Marsh, III (S. W. Tucker on brief) for Appellees.

HAYNSWORTH, Circuit Judge:

The issues tendered by the defendants in this school case have become moot. The appeal will be dismissed for that reason.

As background, reference should first be made to an earlier order from which no appeal was taken.

The Hopewell School Board had been assigning pupils on the basis of geographic zoning, except that members of racial minorities thus assigned to a school were allowed to transfer to some other school in which their race was in the majority. Nine Negro students, in a spurious class action, attacked this method of assignment. In an order dated July 11, 1963, the District Court found that the zone boundaries in some instances had been drawn along racial residential lines, rather than along natural boundaries or the perimeters of compact areas surrounding particular

schools. It concluded that denial of admission of the nine pupils to the schools of their choice was discriminatory. A general injunction was issued. There was a proviso, however, that the School Board might submit a plan for the termination of its discriminatory practices, and, if approved, the general injunction would be suspended and the Board's plan placed in effect.

The School Board accepted this order, and took no appeal from it. Thereafter, it undertook a revision of the school attendance areas, and it eliminated the provision for minority transfers.

Before the Board's revision of its assignment plan was completed, however, and before it was submitted to the Court for approval, it denied fifteen other transfer applications. As to seven, it did so upon the ground that their applications had not been filed by May 31, 1963. As to eight, it did so upon the ground that each of the eight lived close by the school to which he had been assigned and relatively far from the school to which he sought admission.[1] The fifteen filed a motion to intervene in the pending suit and a motion for further relief. By an order dated September 13, 1963, the District Court ordered admission of the fifteen intervening plaintiffs to the schools of their choice.

From this order of September 13, 1963, the School Board and the other defendants have appealed. They contend that seven of the fifteen pupils involved had not applied for transfers prior to May 31, 1963, as required by the rules

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[1] This is also true of the seven whose transfer applications were tardy.

of Virginia's Pupil Placement Board, one of the appealing defendants, and that the denial of the transfer applications was on non-racial, non-discriminatory grounds. In connection with the latter contention, the School Board says it was not applying its old attendance zones but new ones, revised for the purpose of meriting the approval of the District Court. In any event, it says, the school to which each of the fifteen was assigned by it was so close and conveniently accessible to his residence that under any conceivable geographic assignment system he could not have been assigned to any other school. It professes its good faith in denial of the fifteen transfer applications, and its effort in good faith to comply with the law is elsewhere evidenced.

The only immediate effect of the order of September 13, 1963, was the admission of the fifteen intervening plaintiffs to the schools of their choice for the academic year 1963-4. They were admitted, as the order required. That academic year approaches its end. Retransfers at this late date are impractical, as the Board concedes. Indeed, a retransfer of those fifteen pupils during this academic year was not an object of this appeal.

When the School Board transferred the fifteen pupils and accepted those transfers as final for the entire academic year 1963-4, it fully complied with the order of September 13, 1963. The order requires nothing else of it. The controversy has thus become moot.

It is apparent that this appeal was perfected by the School Board out of fear of some future order which it envisions as being within the implications of the order of September 13, 1963. It reads the order of September 13,

1963, as implying that it has no control of assignments, because of the injunction order of July 11, 1963, until it shall have obtained approval of a revised assignment plan. It conjures up the spectre of its helplessness if faced with a flood of transfer applications seeking admission to one of its schools for the 1964-5 academic year.

Its alarms are groundless. The order of September 13, 1963, has no such implications.

Until a new assignment plan is approved, the School Board may limit attendance at any particular school in terms of that school's capacity. It may be that, in order to avoid discrimination, it should permit enrollment in a particular school on a first come first served basis, regardless of race, but when that school is filled, the remaining applicants may be relegated to a second choice of some school not yet filled.

Moreover, the District Court has a wide discretion in authorizing the use of assignment criteria in an interim period during which permanent assignment plans are being formulated and considered. If the School Board feels the need of greater authority than it supposes it has in the interim period, it may apply to the District Court for an interim order accommodating the needs of the Board and the rights of the pupils.

Here, illustratively, the School Board represents to us that it has submitted a revised geographic assignment plan which the District Court has found objectionable only with respect to one boundary. Until the boundary between those two of a number of zones has been acceptably redrawn, it may be that, upon application, the District Court would

permit geographic assignments of all pupils living in all of the other zones, while requiring some other assignment method for pupils living in the two unsettled zones. Whether or not it would, and under what circumstances, would be for the District Court to determine in an exercise of an enlightened discretion with full knowledge of the relevant facts. It is mentioned here only as illustrative of the possibilities of relief for a School Board, endeavoring to bring itself into compliance with the requirements of the law, when it stands in real need of interim authority beyond that it clearly possesses.

Of course, the most effective means by which the School Board may avoid anticipated difficulty in handling assignments for 1964-5 is to produce and submit an approvable plan in time to have it become operable when those assignments are to be made.

Since there has been full compliance with the order of September 13, 1963, and since we cannot now review some order which may be entered in the future affecting assignments for the school year 1964-5, the appeal is moot.

Appeal dismissed.

I concur.

SIMON E. SOBELOFF
U.S.C.J.

ALBERT V. BRYAN, Circuit Judge, dissenting:

I think the appellant School Board still has a lively and substantial concern: what control does it retain over the schools while the new plan is in the making? Further, I do not think the order disapproving the original school

zoning, and granting a general injunction against racial discrimination, should meanwhile oust the Board of the power—indeed the responsibility—to exercise reasonable supervision over the schools.

The regulation instantly undertaken by the Board—and voided by the Court—was the rejection of 15 applications for transfer because the schools requested therein were located far from the residences of these pupils. The Board had assigned them to schools nearby their homes, that is to their neighborhood schools, an entirely lawful basis of selection. Bell v. School City of Gary, Indiana, 32 U. S. L. Week 2219 (7 Cir. Oct. 31, 1963), *cert. denied* —— U. S. —— (May 4, 1964). Furthermore, 7 of the applications had not been timely filed. That this assignment is sensible and this requirement is needed is undenied and undeniable, but the majority now holds they cannot be effectuated, during the pendency of the over-all plan, except by previously and specially obtained permission of the Court. The reverse, I think, should be the rule: regulation by the School Board continues until the Court deems it misdirected, for the bona fides of the Board is unquestioned.

These are current and pressing problems. Delineation of the remaining province of the Board should now be declared, at least to the lifting of the present circumscription.

Ruling of the Court

[July 2, 1964]

The Court: Gentlemen, the school year is fast approaching, and I believe that it is better that the Court decide this matter promptly so the authorities responsible for the education of children, and the children themselves, will understand the basis of their assignment.

The question of the school zones in Hopewell has been before the Court several times. On July 11, 1963, the Court filed a written memorandum. On April 6, 1964, the Court stated from the Bench its findings and conclusions when the plan was presented to it.

As a result of the hearings, and as a result of the consideration that the School Board has given, there have been substantial changes in the plan, or in the school zones since they were first presented to the Court.

The problem of the Woodlawn and Arlington zones still exists. Basically, the problem in this case, as the Court has previously mentioned, is one of de facto segregation.

When the Court considered the case on April 6, it followed the ruling in the *Gary* School case. Since that time, certiorari has been denied in the *Gary* case. Also, since the April 6 hearing, the Court of Appeals has written its opinion in this case.

There, the Court held that the question before it was moot, but it did consider the question of the Arlington and Woodlawn zones. It suggested that until the boundary between those two zones has been acceptably redrawn, that

upon application, the District Court could permit geographic assignments of all students living in all the other zones, while requiring some other assignment method for pupils living in the two unsettled zones.

There have been a number of suggestions before the Court for redrawing the boundary between the Arlington and Woodlawn zones. The Court need not restate the findings of fact that it has previously made, except to note that the Woodlawn School, which has a capacity of 720, and which previously had a capacity of 720, has an anticipated enrollment next fall of 712, as compared with the attendance of 649 which the Court found in the previous hearing.

Arlington School has a capacity of 270, and has an anticipated enrollment of 234, as compared with the attendance of 195 to which the Court previously made reference.

Woodson School, with the transfer of two classrooms from elementary to high school, would have a capacity of 240, as compared to the 300 previously mentioned, and would have an enrollment of 220, as compared to the previously mentioned attendance of 286.

I believe with those amendments the findings of fact are substantially as the Court has found them in the previous hearing, and the Court makes reference to its previous findings at this time, and incorporates them in this hearing.

The chief difference between the situation that now exists and that which existed at the hearing this spring when the Court declined to approve the plan is that the new plan submitted by the Board provides for transfer of Arlington or Woodlawn Elementary pupils to any school nearer a

pupil's residence. It also provides that high school students may transfer from the Hopewell High or Woodson High, as the case may be, to the high school which is nearer their residence.

The Court recognizes that the plaintiffs are not required to rezone—or present a plan of rezoning the problem area in Hopewell. Indeed, during the testimony there were several suggestions made about rezoning between the Woodlawn and the Arlington zones. It is significant, however, that the suggestions made by the plaintiffs do result in imbalance in the various schools involved.

The Court finds that the School Board has attempted in good faith to create zones consistent with the capacity and attendance of the schools, and the Court believes that the plan which has been suggested is consistent with the suggestion made by the Court of Appeals pertaining to some other assignment method in the unsettled zones.

Accordingly, the plan will be approved. The injunction will be dissolved.

All students who are presently assigned by Court order to a school will be permitted to finish their education in that school. There will not be a reassignment of those children, except by application of those children. There has been no application, because that point has not been brought up specifically. This has been treated from that time on more or less as a class action. Those individual plaintiffs have not presented their views to the Court.

Mr. Gray: May I make an inquiry?

The Court: Yes, sir.

Ruling of the Court

Mr. Gray: Would that ruling apply also to the intervenors about whom the Court of Appeals said—they apparently felt that the ruling applied only to one year.

The Court: Yes, sir. The rule applies.

Mr. Gray: To both?

The Court: It will apply to them also. It will apply to all of the children whom the Court has assigned.

• • • • •

Order

[Entered July 6, 1964]

For reasons stated in the Memorandum of the Court filed July 11, 1963 and the rulings of the Court reported April 6, 1964 and July 2, 1964; it is ADJUDGED and ORDERED:

1. Subject to the requirement for notice stated in paragraph 4 of this order, the plan for the operation of schools filed by the School Board of the City of Hopewell, Virginia on June 4, 1964 is approved and the exceptions thereto are overruled.

2. The injunction granted in paragraph 2 of the order entered July 11, 1963 is dissolved.

3. All pupils heretofore assigned by the Court may continue their education in the school to which they have been assigned.

4. The School Board shall give notice in writing to each pupil entitled to make application for transfer under the plan. For the first year of the plan, applications for transfer must be filed within thirty days from the date notice is mailed to students eligible for transfer.

5. The motion for counsel fees is continued.

6. This cause is retained on the docket with leave of any party to seek further relief.

Let the Clerk mail copies of this order to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

July 6, 1964

Opinion Dated April 7, 1965

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9625.

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and mother and next friend, and all others of the plaintiffs,

Appellants,

versus

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia,

Appellees.

No. 9626.

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and mother and next friend, and all others of the plaintiffs,

Appellees,

versus

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia,

Appellants.

Opinion Dated April 7, 1965

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
John D. Butzner, Jr., District Judge.

(Argued November 5, 1965. Decided April 7, 1965.)

Before:

SOBELOFF, *Chief Judge,* and
HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL,
Circuit Judges, sitting en banc.

Henry L. Marsh, III, and S. W. Tucker for Appellants in No. 9625 and for Appellees in No. 9626, and Frederick T. Gray (Williams, Mullen and Christian on brief) for Appellees in No. 9625 and for Appellants in No. 9626.

HAYNSWORTH, Circuit Judge:

These are cross appeals from an order of the District Court approving Hopewell's geographic plan for the assignment of pupils to its schools and refusing to require the retransfer of certain Negro pupils attending schools outside of their geographic zones under a previous order of the Court. Finding no error on either appeal, we affirm.

Hopewell, Virginia, is an industrial city located at the confluence of the James and Appomattox Rivers. It is roughly bisected by the Norfolk and Western Railroad, which runs from Hopewell's southwestern border roughly northeasterly to the James River, while the Seaboard Airline Railroad divides the city in an approximately east-west direction. Except in the southwestern portion of the

city, the Norfolk and Western Railroad is bounded on its southeastern side by many factories, and there are long reaches of that railroad which are uncrossed by streets. These railroads, and the industrial sections which bound them, constitute obvious and natural geographic boundaries between residential areas, some of which are made remote from each other by the intervening industrial, nonresidential sections which abut the railroads.

The School Board adopted a geographic zoning plan. The zone boundaries were drawn along natural geographic boundaries, particularly the railroads. The schools are centrally located in each zone, except for two zones in areas annexed to the City of Hopewell after those two schools had been constructed.

Some Negroes live on the northwestern side of the Norfolk and Western Railroad. They are in an elementary school zone in which the majority of the residents are white. Pupils from the elementary school in that zone are fed automatically to a high school in which the majority of the pupils are white.

The great majority of the Negro residents of Hopewell live on the southeastern side of the Norfolk and Western Railroad. With an exception to be mentioned presently, the residential areas in which they live are separated from residential areas inhabited principally by white people by the railroad and by industrialized, nonresidential sections. One elementary school is located centrally in the area it serves, as is another combined elementary and high school attended entirely by Negroes. A third elementary school attended solely by Negroes is located at the extended city limits, this being one of the schools which came into the

Hopewell City School System by annexation after it had been constructed.

When this action was first commenced and before the court approved Hopewell's geographic zoning plan, it ordered the admission of the then infant plaintiffs into the schools of their choice. They were admitted, after which the School Board took an appeal to this Court. We held that the question was moot, since the order required their admission only for the current year and the School Board had fully complied with the order.[1]

Thereafter, after some modification of the plan, principally the addition of a provision giving any child who lived nearer to a school outside of the zone in which its residence was located a right to attend that school, the District Court approved the plan. It refused, however, to require, or permit, the involuntary retransfer of the original plaintiffs transferred pursuant to the earlier order of the Court.

The plaintiffs concede, in general, that the elementary school zone boundaries were drawn along natural geographic boundaries and barriers. They contend as unreasonable only the boundary between Arlington and Woodlawn School zones. That boundary, however, runs along a main arterial highway, and the plaintiffs can suggest no other boundary between those zones of geographic significance. Use of that boundary incorporates in the Woodlawn zone certain areas which are closer to Arlington School. However, any transfer to Arlington of any readily divisible portion of that part of the Woodlawn School zone lying

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[1] *Gilliam* v. *School Board of City of Hopewell, Virginia*, 4 Cir., 332 F. 2d 460.

closer to Arlington School would result in a transfer to Arlington School of far more pupils than it could receive, leaving Woodlawn School greatly underpopulated.

These are the two schools which Hopewell acquired by annexation of adjacent territory. Neither is centrally located in the zone it serves, but the main highway along which the School Board has drawn the boundary which separates those two zones is patently the most logical and reasonable. Such an artery is a natural boundary to choose in the absence of any other significant geographic feature. The fact that a portion of Woodlawn zone lies closer to Arlington School than Woodlawn School is not a valid objection to the plan when incorporating a portion of that area into the Arlington School zone would leave Arlington overwhelmed with pupils, for which it could not care, and Woodlawn greatly underpopulated. Arlington zone's other boundaries are the limits of the City, the Seaboard Airline Railroad and industrial areas, so that there are no feasible compensating adjustments by which portions of the Arlington zone might be shifted to permit it to include a portion of Woodlawn zone.

Under these circumstances, the District Court was abundantly justified in concluding that the zone boundaries were reasonably drawn in accordance with natural geographic features and not on racial lines.

Assignments to the high schools are made in accordance with a feeder system. We find nothing objectionable in this when the primary school zoning is on a nonracial basis, for the result is, in effect, to create reasonable zones for the high schools. The zones of those primary schools which feed each high school are collectively the zone for the high

school. So viewed, the high school zones are as compact and reasonable as the primary school zones which we have considered.

The plaintiffs suggested below that the high school zones might have been drawn differently, but their suggestion was impractical because it would have overly crowded one school while underpopulating another. The School Board's lines achieved an even distribution of pupils, and there was an evidentiary basis supporting the District Court's approval of them.

Under the plan, the School Board reserved the right to consider transfer applications to a school other than the one serving the zone in which the pupil resides if founded upon some specific reason, but the plan provides that the race of the applicant will not be a factor to be considered in granting or denying such a transfer application. The School Board in this Court insists that the reservation is intended to take care of extraordinary cases such as that of a crippled child whose mother is a teacher in a school other than one in the zone in which they reside. It is not to be used, the Board says, for the purpose of avoiding or increasing the extent of the mixing of the races in the schools which results from the geographic zoning plan. That is the clear purpose and effect of the plan's limitation upon the reservation. The restriction saves the reservation which would otherwise be suspect, for permissive transfers of minorities granted because of their race are unlawful.[2]

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[2] *Goss* v. *Board of Education of Knoxville, Tennessee*, 373 U. S. 683; *Dillard* v. *School Board of City of Charlottesville*, 4 Cir., 308 F. 2d 920.

The plaintiffs object that the result of the geographic zoning is a large measure of *de facto* segregation. It is true that it is, but this is because of the residential segregation that exists. The Harry E. James School zone, for instance, bounded in part by Hopewell's city limits, is otherwise largely surrounded by railroad classification yards and industrial tracks, with adjacent industrialized areas, which isolate the residential portions of that zone from all other residential areas. *De facto* segregation could be avoided for those pupils only by transporting them to distant schools.

While the Carter Woodson and the Arlington school zones are not so isolated as the Harry E. James school zone, substantially the same thing may be said of them. They are not gerrymandered zones designed to impose a segregated school population, but *de facto* segregation results from the fact that the surrounding residential areas are inhabited entirely by Negroes.

The Constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools.[3]

The plaintiffs also complain that the District Court did not order a general reassignment of teachers and administrative personnel on a nonracial basis. There has been no inquiry into that matter in the District Court, and the failure of the District Court here to enter an order in accordance with this request of the plaintiffs is affirmed for

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[3] *Bell* v. *School City of Gary, Indiana*, 7 Cir., 324 F. 2d 209; see also *Bradley* v. *School Board of City of Richmond, Virginia*, 4 Cir., —— F. 2d —— (decided this day).

the reasons stated in Bradley v. School Board of City of Richmond, Virginia, 4 Cir., —— F. 2d —— (decided today).

The School Board's appeal from the Court's refusal to require or permit the involuntary reassignment of the fifteen pupils, we also find to be without merit.

It is true that in our earlier opinion[4] we held that the original order of the District Court required the admission of these fifteen pupils to the schools of their choice for the then current school year only. That was the school year of 1963-4. Under the geographic zoning plan, which the Court has now approved, those fifteen pupils would be assigned to other schools than those they now attend.

A reassignment of those fifteen pupils to the schools they attended prior to 1963-4 may have a substantially adverse effect upon them. The District Court was entitled to give consideration to that fact, though their continued attendance at the schools where they were assigned for 1963-4 is inconsistent with the otherwise uniformity of the geographic attendance plan.

In approving a geographic zoning plan, indeed, any other plan for the assignment of pupils, a District Court has a large measure of discretion in imposing such conditions or exceptions as fairness and justice seem to it to require. The question, therefore, is not answered by a finding that the assignment of these pupils is a departure from the geographic zoning plan which we now approve. It is an exception to it, but the exception imposed by the District Court

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[4] *Gilliam* v. *School Board of City of Hopewell, Virginia*, 332 F. 2d 460.

in the interest of fairness to these fifteen individuals was not beyond the range of discretion vested in it.

We find no reversible error in the order of the District Court.

Affirmed.

SOBELOFF and J. SPENCER BELL, Circuit Judges, concurring separately:

The neighborhood school concept is a legitimate one, and insofar as zone boundaries are drawn without racial discrimination along natural geographical lines we agree that they may be accepted as valid. We are conscious, however, that the size and location of a school building may determine the character of the neighborhood it serves. In applying the neighborhood school concept, the School Board, therefore, must keep in mind its paramount duty to afford equal educational opportunity to all children without discrimination; otherwise school building plans may be employed to perpetuate and promote segregation.

We also note the reservation contained in the opinion of the court in respect to the possible misuse of the transfer plan; and assume that the District Court will be alert to prevent abuses. With these considerations in mind and subject to the views expressed more fully in our separate opinion in the *Richmond* case decided this day, we concur in the judgment of the court.

Opinion Dated April 7, 1965

ALBERT V. BRYAN, Circuit Judge, dissenting in part:

With the plan of desegregation approved, as it is, I can see neither logic nor other ground for not retransferring the fifteen pupils to the school the plan provides for them. The School Board has requested the reassignment. However, the Court finds it would "have a substantially adverse effect" upon the students. It seems to me the school authorities are better versed than are we on that score. Moreover, the assignment initially was understood to be simply provisional. Finally, the Board as well as the scholars is entitled to indiscriminate enforcement of a legitimate plan.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9625

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and next friend, and all others of the plaintiffs,

Appellants,

vs.

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record for the United States District Court for the Eastern District of Virginia, and was argued by counsel.

Judgment

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this case, be, and the same is hereby, affirmed with costs.

April 7, 1965

CLEMENT F. HAYNSWORTH
Chief Judge, Fourth Circuit

Filed
Apr. 7, 1965

MAURICE S. DEAN
Clerk

NOTE: The map on the facing page is a photographic reproduction of the original Defendant's Exhibit 1, with hand coloring of significant features to approximate the original coloring.

(See opposite) ☞

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PRINCE GEORGE
COUNTY
CITY LIMITS
CITY LIMITS
CITY LIMITS
CITY LIMITS

CHESTERFIELD

COUNTY

APPOMATTOX

RIVER

ESTERFIELD

COUNTY

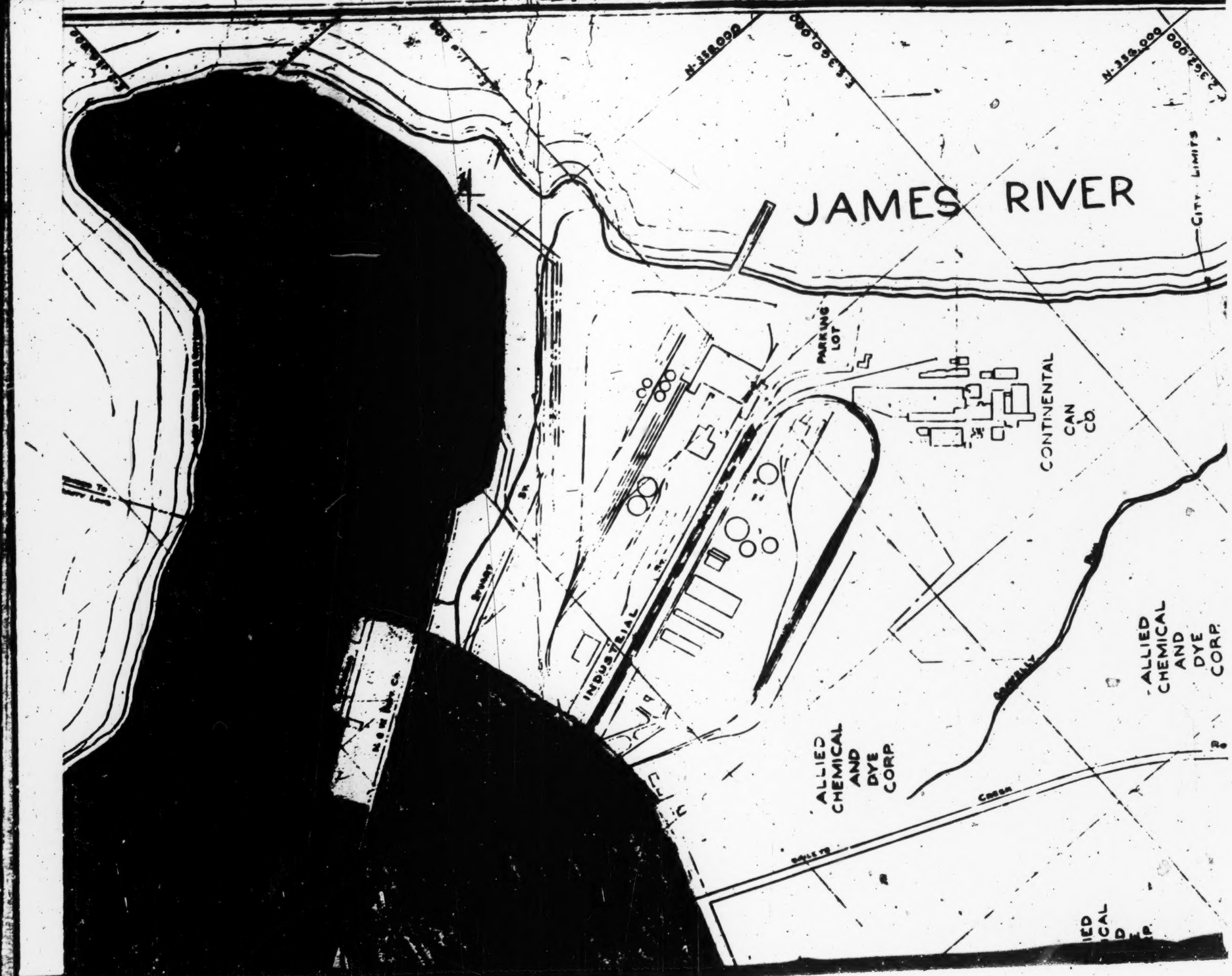
DX-1
CA 3554
3-23-64

E-2,334,000

N-262,000

Proposed School Attendance Areas
For the City of Hopewell

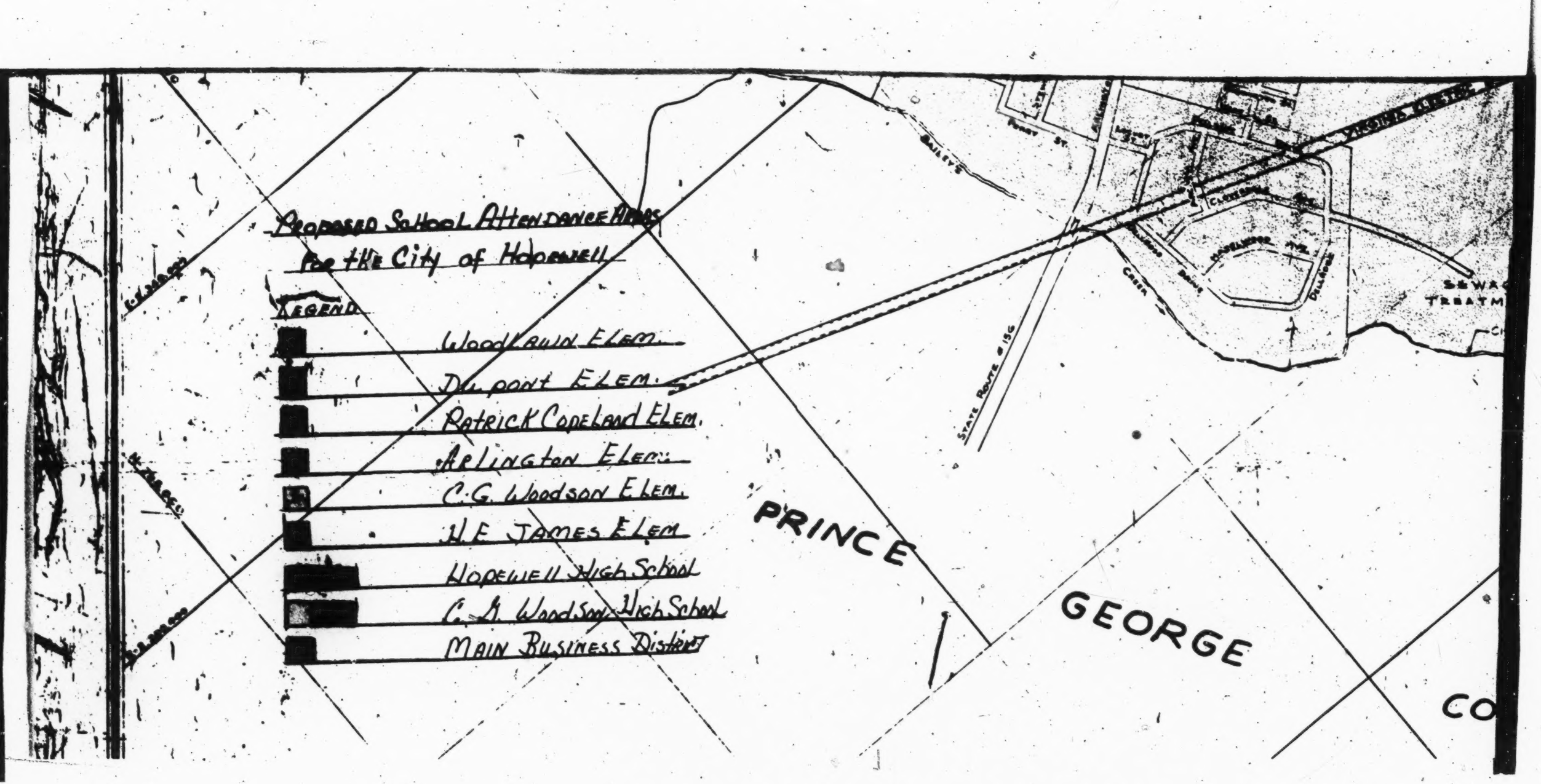
ALLIED
CHEMICAL
AND
DYE
CORP.
ALLIED
CHEMICAL
AND
DYE
CORP.
HERCULES
POWDER
CO.
ATLANTIC COAST LINE RAILROAD
FIELDS

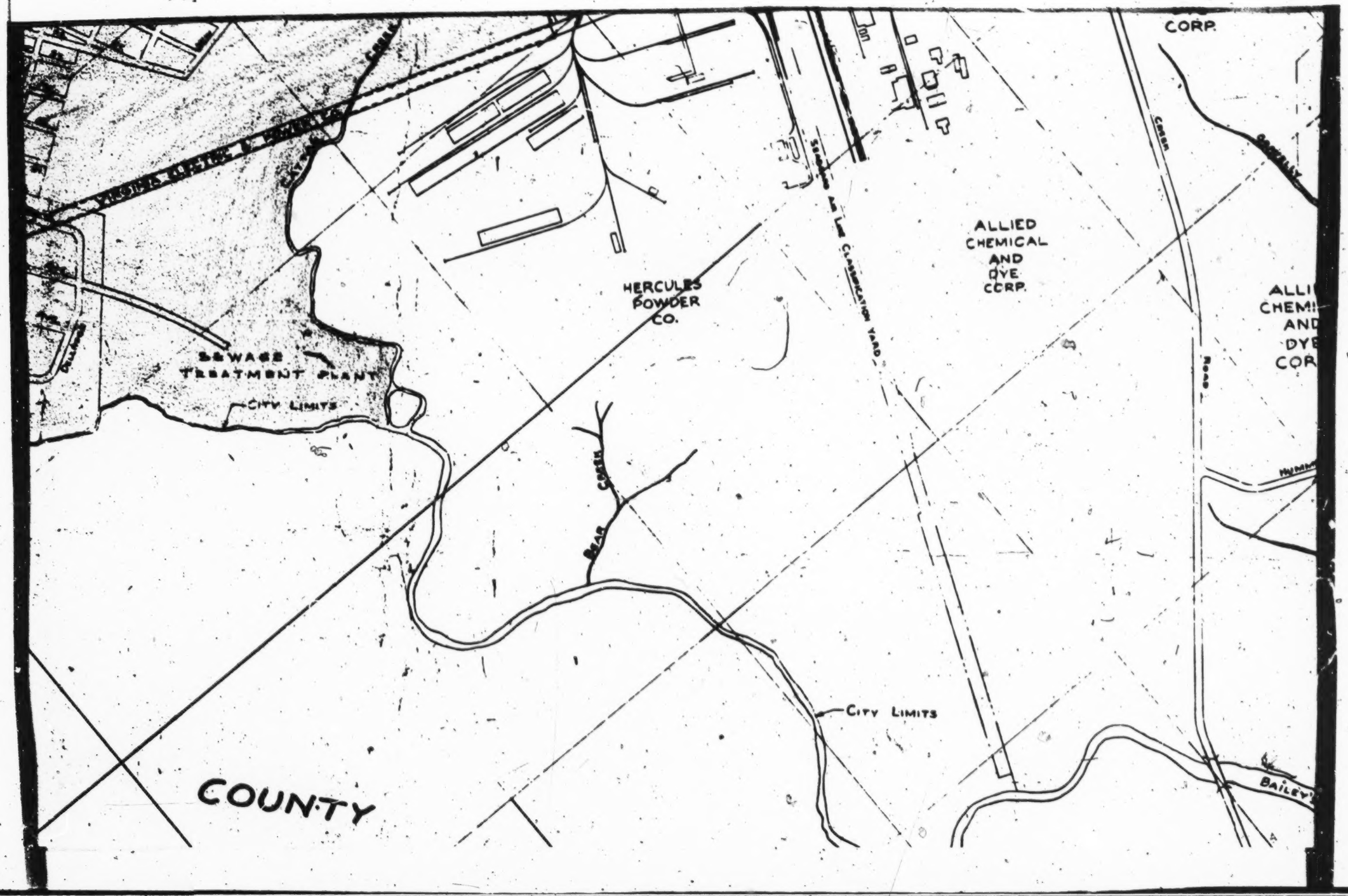

JAMES RIVER
CITY LIMITS
PARKING LOT
CONTINENTAL CAN CO.
INDUSTRIAL
ALLIED CHEMICAL AND DYE CORP.
ALLIED CHEMICAL AND DYE CORP.
CREEK
PARKING LOT
ENTAL

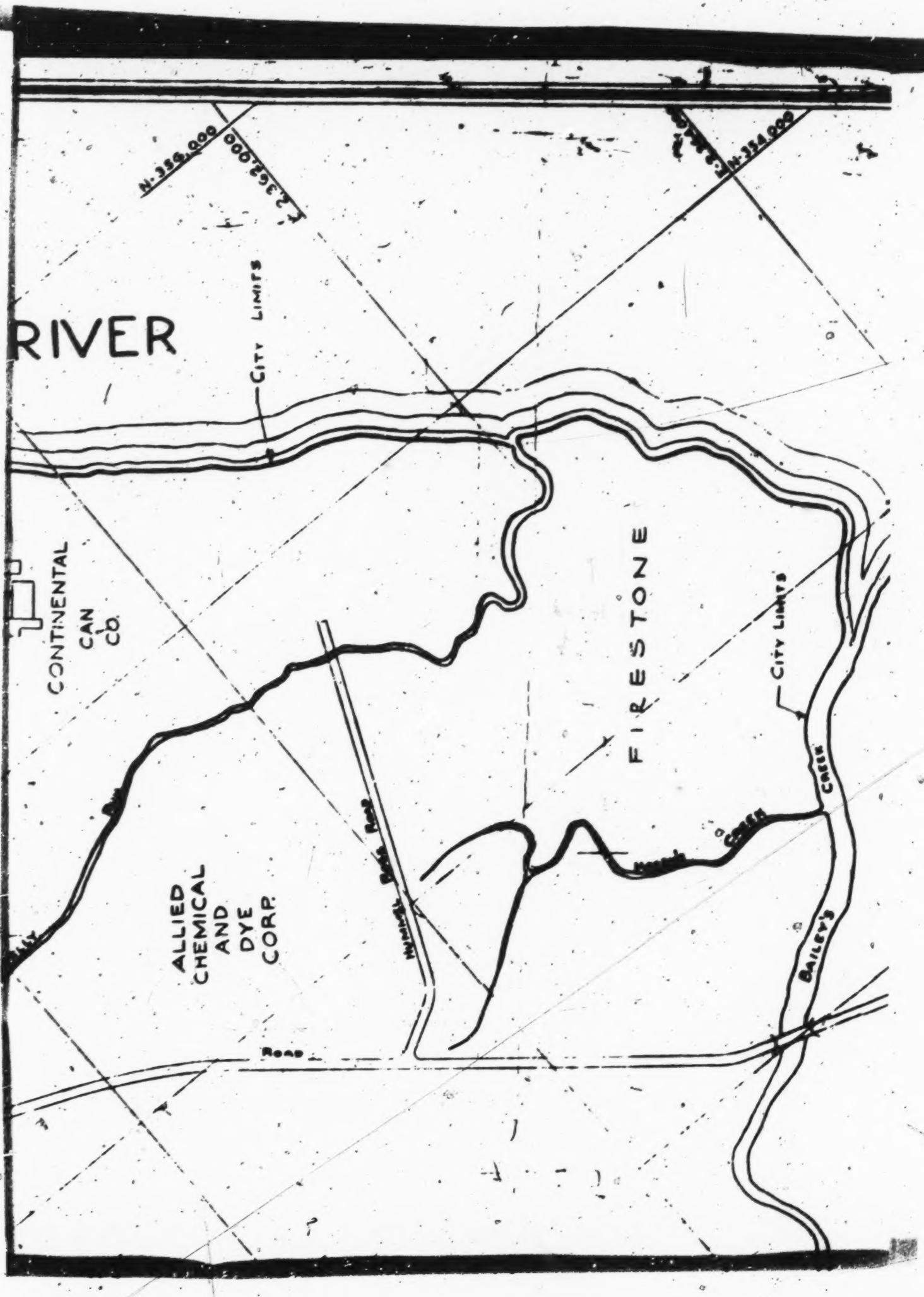
Proposed School Attendance Areas
For the City of Hopewell

LEGEND

- Woodlawn Elem.
- Du pont Elem.
- Patrick Copeland Elem.
- Arlington Elem.
- C.G. Woodson Elem.
- H.E James Elem.
- Hopewell High School
- C.G. Woodson High School
- Main Business District




CORP.
ALLIED
CHEMICAL
AND
DYE
CORP.
HERCULES
POWDER
CO.
SEWAGE
TREATMENT PLANT
CITY LIMITS
CITY LIMITS
COUNTY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E-2,362,000
N-354,000
RIVER
CITY LIMITS
CONTINENTAL CAN CO.
FIRESTONE
CITY LIMITS
ALLIED CHEMICAL AND DYE CORP.
Hudson River Road
Hudson Creek
Bailey's Creek
Road

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JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1965

No. 415

CAROLYN BRADLEY, ET AL.,
Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL.,
Respondents.

Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

J. ELLIOTT DRINARD
City Hall
Richmond, Virginia
City Attorney

HENRY T. WICKHAM
1407 State-Planters Bank Bldg.
Richmond, Virginia
Special Counsel

Attorneys for Respondents

August 26, 1965

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Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PRELIMINARY STATEMENT

Respondents take no exception to the Petitioners' statement of the case as set forth in their petition. However, the real questions presented to the Court are not as stated by Petitioners.

THE QUESTION PRESENTED

Should this Court grant a writ of certiorari when Petitioners have an adequate and speedy remedy in the district court for determination of the questions here presented?

ARGUMENT

Petitioners Have Adequate Remedy In District Court

Petitioners apparently concede in their petition that the Respondents' plan of assignment is adequate. They complain only of the fact that a plan of faculty desegregation was not presented to the district court.

In July, 1962, the evidence before the district court was that the faculties were segregated. On appeal the case was reversed in part and remanded. The question of faculty segregation was not there argued by Petitioners or discussed in the opinion of the Fourth Circuit. *Bradley* v. *School Board,* 317 F. (2d) 429 (1963).

On July 29, 1963, and again on December 20, 1963, the district court heard evidence concerning the Respondents' plan of assignment. At both hearings the Superintendent of Schools, respondent H. I. Willett, was called as a witness on behalf of the Petitioners (R. Vol. III and IV). During these examinations no questions were directed toward, and no information was sought concerning faculty segregation or plans for faculty integration.

The district court approved the plan of assignment by memorandum opinion and order dated March 16, 1964, and retained the case "on the docket with leave of any party to seek further relief." (Petitioners' App., p. 38a).

The court below affirmed, recognizing Petitioners' right to raise the question of the assignment of teachers, but pointing out that resolution of such a question "should await a full hearing on the merits." (345 F. (2d) at p. 320)

In the opinion of the court below it was noted that "the question of assignment of teachers was ignored in the hearings below," and in this connection the court stated:

"* * * There has been no inquiry as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils, nor has there been any inquiry as to the impact of such an order as the plaintiffs seek upon the administration of the schools and upon the teachers and the administrative personnel. The undeveloped record furnishes no basis for judgment apart from a conviction, in agreement with the Fifth Circuit, that decision cannot precede a full and complete inquiry in the District Court into the merits.

"When there has been no inquiry into the matter, it cannot be said that the plaintiffs have discharged the burden they must shoulder of showing that such assignments effect a denial of their constitutional rights.

"Whether and when such an inquiry is to be had are matters with respect to which the District Court also has a large measure of discretion. The Fifth and Sixth Circuits have so held, and we agree. When direct measures are employed to eliminate all direct discrimination in the assignment of pupils, a District Court may defer inquiry as to the appropriateness of supplemental measures until the effect and the sufficiency of the direct ones may be determined. The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools. An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils." (345 F. (2d) at pp. 320-321)

In the dissenting opinion of the court below it was observed that there was no legal reason why desegregation of faculties and student bodies "may not proceed simultaneously" and that "the matter should be inquired into promptly." (345 F. (2d) at p. 324)

As previously pointed out, this case has been retained on the docket of the district court and the Petitioners may seek further and immediate relief there.

Petitioners have not inquired into Respondents' practice concerning assignment of faculties since July, 1962. Since that time, public records and published reports would indicate that visiting white teachers teach in integrated schools and so-called Negro schools; that the faculties in the public school system were integrated during the summer sessions of 1964 and 1965, and that there will be integrated faculties for the school session beginning in September, 1965.

Petitioners also know, or should know, that the Respondents have met the standards established by the United States Commissioner of Education, as authorized by Title VI of the Civil Rights Act of 1964, concerning desegregation of faculty and staff, and have received regular federal assistance and one special grant. Likewise, the Respondents have qualified for and received two special grants from the United States Office of Economic Opportunity under Title II A of the Economic Opportunity Act of 1964. These grants were received for the Head Start Program and the Community Action Program.

The opinion of the court below is clear and no doubts are cast on the question of faculty desegregation as contended by Petitioners. Both the majority and the dissenters clearly point to the route over which Petitioners may travel. The proper forum to raise the questions presented by Petitioners is the district court. A speedy and adequate remedy is available there.

CONCLUSION

Petitioners appear to be requesting this Court to render an advisory opinion on a record that is void of facts concerning the assignment of faculty and staff in the public school system. They point to no decision on the same matter in conflict with the decision rendered below. No question of federal law was decided in the court below which has not been decided by this Court. Finally, the court below decided no federal question in a way which conflicts with applicable decisions of this Court.

In view of the aforegoing it is submitted that the petition for certiorari should be denied.

Respectfuly submitted,

J. ELLIOTT DRINARD
City Hall
Richmond, Virginia
City Attorney

HENRY T. WICKHAM
1407 State-Planters Bank Bldg.
Richmond, Virginia
Special Counsel

Attorneys for Respondents

August 26, 1965

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In The

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October Term, 1965

No. 416

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v.

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FREDERICK T. GRAY
Attorney for Respondents

WILLIAMS, MULLEN & CHRISTIAN
1309 State-Planters Bank Building
Richmond, Virginia

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

This brief is filed on behalf of the respondents School Board of the City of Hopewell, Virginia, and Charles W. Smith, Division Superintendent of Schools, in opposition to the granting of the Writ of Certiorari prayed for in the petition for the reason that the courts below have properly applied the rule of *Bell* v. *School City of Gary, Indiana,* 7 Cir. 324 F. 2d 209, cert. den. 377 U.S. 924 to the effect that *de facto* segregation resulting from school zones which are not gerrymandered does not violate the Constitution and for the reason that the practices of respondents with

respect to the faculties in its school has not been properly raised or heard in the District Court and the petitioners have a speedy and adequate forum in that Court in which to raise and be heard on the issue which they seek to litigate at the appellate level.

THE STATEMENT OF THE CASE

It would be difficult to improve on the clear and concise statement made by Judge Haynesworth speaking for the Court of Appeals. For this Court's convenience we quote here the more pertinent portions of his statement of the facts:

> "Hopewell, Virginia, is an industrial city located at the confluence of the James and Appomattox Rivers. It is roughly bisected by the Norfolk and Western Railroad, which runs from Hopewell's southwestern border roughly northeasterly to the James River, while the Seaboard Airline Railroad divides the city in an approximately east-west direction. Except in the southwestern portion of the city, the Norfolk and Western Railroad is bounded on its southeastern side by many factories, and there are long reaches of that railroad which are uncrossed by streets. These railroads, and the industrial sections which bound them, constitute obvious and natural geographic boundaries between residential areas, some of which are made remote from each other by the intervening industrial, nonresidential sections which abut the railroads.
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> "The School Board adopted a geographic zoning plan. The zone boundaries were drawn along natural geographic boundaries, particularly the railroads. The schools are centrally located in each zone, except for two zones in areas annexed to the City of Hopewell after those two schools had been constructed.
>
> "Some Negroes live on the northwestern side of the Norfolk and Western railroad. They are in an elemen-

tary school zone in which the majority of the residents are white. Pupils from the elementary school in that zone are fed automatically to a high school in which the majority of the pupils are white.

"The great majority of the Negro residents of Hopewell live on the southeastern side of the Norfolk and Western Railroad. With an exception to be mentioned presently, the residential areas in which they live are separated from residential areas inhabited principally by white people by the railroad and by industrialized, nonresidential sections. One elementary school is located centrally in the area it serves, as is another combined elementary and high school attended entirely by Negroes. A third elementary school attended solely by Negroes is located at the extended city limits, this being one of the schools which came into the Hopewell City School System by annexation after it had been constructed.

"When this action was first commenced and before the court approved Hopewell's geographic zoning plan, it ordered the admission of the then infant plaintiffs into the schools of their choice. They were admitted, after which the School Board took an appeal to this Court. We held that the question was moot, since the order required their admission only for the current year and the School Board had fully complied with the order.[1]

"Thereafter, after some modification of the plan, principally the addition of a provision giving any child who lived nearer to a school outside of the zone in which its residence was located a right to attend that school, the District Court approved the plan. It refused, however, to require, or permit, the involuntary re-transfer of the original plaintiffs transferred pursuant to the earlier order of the Court.

---

[1] Gilliam v. School Board of City of Hopewell, Virginia, 4 Cir., 332 F.2d 460.

"The plaintiffs concede, in general, that the elementary school zone boundaries were drawn along natural geographic boundaries and barriers. They contend as unreasonable only the boundary between Arlington and Woodlawn School zones. That boundary, however, runs along a main arterial highway, and the plaintiffs can suggest no other boundary between those zones of geographic significance. Use of that boundary incorporates in the Woodlawn zone certain areas which are closer to Arlington School. However, any transfer to Arlington of any readily divisible portion of that part of the Woodlawn School zone lying closer to Arlington School would result in a transfer to Arlington School of far more pupils than it could receive, leaving Woodlawn School greatly underpopulated.

"These are the two schools which Hopewell acquired by annexation of adjacent territory. Neither is centrally located in the zone it serves, but the main highway along which the School Board has drawn the boundary which separates those two zones is patently the most logical and reasonable. Such an artery is a natural boundary to choose in the absence of any other significant geographic feature. The fact that a portion of Woodlawn zone lies closer to Arlington School than Woodlawn School is not a valid objection to the plan when incorporating a portion of that area into the Arlington School zone would leave Arlington overwhelmed with pupils, for which it could not care, and Woodland greatly underpopulated. Arlington zone's other boundaries are the limits of the City, the Seaboard Airline Railroad and industrial areas, so that there are no feasible compensating adjustments by which portions of the Arlington zone might be shifted to permit it to include a portion of Woodlawn zone.

"Under these circumstances, the District Court was abundantly justified in concluding that the zone boundaries were resonably drawn in accordance with natural geographic features and not on racial lines.

"Assignments to the high schools are made in accordance with a feeder system. We find nothing objectionable in this when the primary school zoning is on a nonracial basis, for the result is, in effect, to create reasonable zones for the high schools. The zones of those primary schools which feed each high school are collectively the zone for the high school. So viewed, the high school zones are as compact and reasonable as the primary school zones which we have considered.

"The plaintiffs suggested below that the high school zones might have been drawn differently, but their suggestion was impractical because it would have overly crowded one school while underpopulating another. The School Board's lines achieved an even distribution of pupils, and there was an evidentiary basis supporting the District Court's approval of them."

ARGUMENT

I

The Geographic Features of the Assignment Plan Were Properly Approved

The foregoing statement of the case makes it abundantly clear that the school zones adopted by the respondent school board are drawn as far as possible along natural geographic boundaries particularly railroads. As the Court of Appeals noted the petitioners "contend as unreasonable only the boundary between Arlington and Woodlawn School Zones." As the Court noted the boundary between those zones is geographically the most significant. THE BOUNDARY RESULTS IN A DIVISION OF THE PUPILS BETWEEN THE ZONES WHICH ALMOST PERFECTLY MATCHES THE SCHOOL CAPACITIES. The boundary suggested by the petitioners would leave "Arlington overwhelmed with pupils, for which it could not care, and Woodlawn greatly underpopulated."

It should also be noted that insofar as the racial composition of the schools is concerned the transfer of residence by any child, white or colored, will result in his transfer to the school serving his new residence regardless of the racial composition of that school. Under those circumstances the plan may be said to meet the true Constitutional test—for it is colorblind.

II

The Faculty Question is Not Before The Court

If the question of faculty desegregation is involved in this case it must have arisen in the original complaint or in the Motion for Further Relief. The petitioners did not appeal from the ruling of the District Court on either of those pleadings and in neither instance did the court treat with the matter of faculty. What is now before the Court is the action of the District Court in approving a plan called for by the District Court in its order on the original complaint. At that time the District Court ordered:

> "The School Board of the City of Hopewell and the Division Superintendent of Schools, however, are granted leave to file with the Court within 90 days a plan to provide for immediate steps to terminate discriminatory practices *in the assignment of pupils to the schools in the City*. If a plan is submitted and approved, the injunction mentioned in paragraph 2 of this order shall be suspended and the admission of Negro students may be in accordance with the plan." (Italics supplied.)

It is clear therefore that the plan called for deals only with "assignment of pupils to schools" and not to faculty practices—as the Court of Appeals noted "There has been no inquiry into that matter in the District Court * * *." The

petitioners have a readily available forum in which to have the matter examined into—it should not and cannot appropriately be opened at this stage.

CONCLUSION

For the reasons stated it is submitted that the petitioners fail to present a case in which certiorari should be granted.

Respectfully submitted,

FREDERICK T. GRAY
Attorney for Respondents

WILLIAMS, MULLEN & CHRISTIAN
1309 State-Planters Bank Building
Richmond, Virginia

END